



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

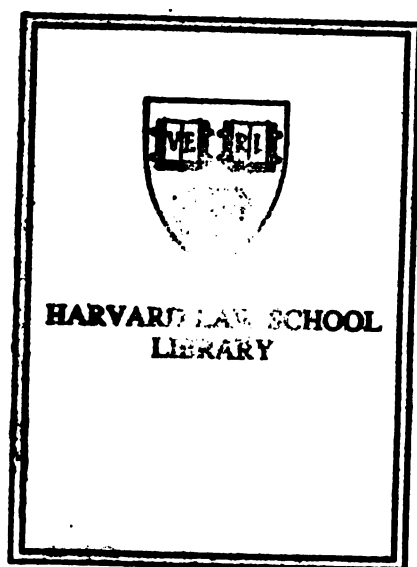
We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>





MINNESOTA REPORTS

9

VOL. 57

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA

FEBRUARY, 1894—JUNE, 1894

CHARLES C. WILLSON

REPORTER

ST. PAUL
WEST PUBLISHING CO.
1895

COPYRIGHT, 1896

BY

ALBERT BERG

**SECRETARY OF THE STATE OF MINNESOTA, IN TRUST FOR THE BENEFIT OF THE
PEOPLE OF SAID STATE**

Rec. Dec. 20, 1895.

JUSTICES
OF THE
SUPREME COURT OF MINNESOTA

DURING THE TIME OF THESE REPORTS.

HON. JAMES GILFILLAN, CHIEF JUSTICE.
HON. WILLIAM MITCHELL.
HON. LOREN W. COLLINS.
HON. DANIEL BUCK.
HON. THOMAS CANTY.

CHARLES P. HOLCOMB, Esq., Clerk.

ATTORNEY GENERAL,
HON. HENRY W. CHILDS.

By 1878 G. S., ch. 27, § 2, the reporter is required to report all cases argued and determined in the court.

By the practice of the court, based on 1878 G. S., ch. 63, § 4, the head note in each case is prepared by the Judge writing the opinion.

The statement of the case is made by the reporter, from the return to this court. The epitome of the argument is condensed from the briefs of counsel. For the correctness of these, the reporter alone is responsible.

The number between the title and the syllabus of each case reported, is the number of the case in the files of the clerk of this court.

I am indebted to Geo. J. Allen, Esq., of the Rochester Bar for valuable assistance in the preparation of this volume. He verified the citations, and made the tables of cases and statutes cited.

Dated Rochester, Minn., October 2, 1895.

CHAS. C. WILLSON.

(iv)

CASES REPORTED.

	Page		Page
Alexander v. City of Duluth	47	Chicago, M. & St. P. Ry. Co.	
Amort v. Christofferson	234	(Schulz v.)	271
Anheuser - Busch B. Ass'n		Chicago, St. P., M. & O. Ry.	
(Steele v.)	18	Co. (Kaje v.)	422
Bank of Commerce v. Smith	374	Chicago, St. P., M. & O. Ry.	
Bardwell - Robinson Co. v.		Co. (Slama v.)	167
Brown	140	Chisholm (Mitchell v.)	148, 155
Barge v. Schiek	155	Christofferson (Amort v.)	234
Barge v. Van Der Horck	497	Christofferson v. Howe	67
Barnum (Lanpher v.)	172	Chute (Ortman v.)	452
Bishop & Co. v. Buckeye Pub.		City of Duluth (Alexander v.)	47
Co.	219	City of Duluth (Hill v.)	231
Bissell (In re)	78	City of Duluth (Woodbridge v.)	256
Blake v. Hogan	45	City of Minneapolis (Kelly v.)	294
Blyhl v. Village of Waterville	115	City of St. Paul (Egan v.)	1
Bouck v. Bouck	490	City of St. Paul (Munger v.)	9
Bowen (Wolford v.)	267	Clarke (Eide v.)	397
Bower (Schultz v.)	493	Cleghorn v. Minnesota T. Ins.	
Brown (Bardwell-Robinson Co.		& T. Co.	341
v.)	140	Clement v. Brown	314
Brown (Clement v.)	314	Cochran v. Stewart	499
Brown (Rogers v.)	223	Colby v. Life Indem. & Inv.	
Buckeye Pub. Co. (Bishop &		Co.	510
Co. v.)	219	Connelly (State v.)	482
Burbank (Farrell v.)	395	Conrad v. Dobmeier	147
Cargill v. Thompson	534	Cook (Olson v.)	552
Castle v. Elder	289	Corbett (State v.)	345
Central V. I. Co. (Sharvey v.)	216	Crawford v. Hurd Refrigerator	
Chicago, M. & St. P. R. Co.		Co.	187
(Halverson v.)	142	Crookston Imp. Co. v. Marshall	333
Chicago, M. & St. P. Ry. Co.		Crookston W. P. & L. Co.	
(Kennedy v.)	227	(Davis v.)	402
Chicago, M. & St. P. Ry. Co.		Dart (State ex rel. v.)	261
(Powers v.)	332	Davis v. Crookston W. P. & L.	
Chicago, M. & St. P. Ry. Co.		Co.	402
(Rutherford v.)	237	Davison v. Sherburne	355
		Dennis v. Jackson	286

	Page		Page
Dobmeier (Conrad <i>v.</i>)	147	Haugen <i>v.</i> Younggren	170
Douglas <i>v.</i> Leighton	81	Hawkins <i>v.</i> Manston	323
Dressel <i>v.</i> Shipman	23	Healey (Wykoff <i>v.</i>)	14
Duluth City (Alexander <i>v.</i>) . .	47	Heavenrich <i>v.</i> Steele	221
Duluth City (Hill <i>v.</i>)	231	Hess' Estate (In re)	282
Duluth City (Woodbridge <i>v.</i>) .	256	Hess (Taylor <i>v.</i>)	96
Duluth & I. R. R. Co. (Eric- son <i>v.</i>)	26	Hill <i>v.</i> Duluth City	231
Duluth St. Ry. Co. (McKillop <i>v.</i>)	408	Hoffman <i>v.</i> Meyer	25
Eastman <i>v.</i> Vetter	164	Hoffman (Shirk <i>v.</i>)	230
Egan <i>v.</i> City of St. Paul	1	Hogan (Blake <i>v.</i>)	45
Ege (Gates <i>v.</i>)	465	Howe (Christofferson <i>v.</i>) . . .	67
Eide <i>v.</i> Clarke	397	Hurd Refrigerator Co. (Craw- ford <i>v.</i>)	187
Elder (Castle <i>v.</i>)	289	In re Bissell	78
Elgin City B. Co. <i>v.</i> Zelch . .	487	In re Glynn's Estate	21
Elston <i>v.</i> Fieldman	70	In re Hess' Estate	282
Ericson <i>v.</i> Duluth & I. R. R. Co.	26	In re Iron Bay Co. . . .	338
Farrell <i>v.</i> Burbank	395	In re Shea	415
Fieldman (Elston <i>v.</i>)	70	In re State Bank	361
Firemen's Ins. Co. (Minneapo- lis T. M. Co. <i>v.</i>)	35	In re Thompson's Estate . . .	109
Firemen's Ins. Co. (Nippolt <i>v.</i>)	275	In re Ward's Estate	377
Fisher (Webb <i>v.</i>)	441	Iron Bay Co. (In re)	338
Fitzgerald <i>v.</i> McMurren	312	Jackson (Dennis <i>v.</i>)	286
Forepaugh <i>v.</i> Westfall	121	Jefferson (Wood Harvester Co. <i>v.</i>)	456
Fredette <i>v.</i> Thomas	190	Jenks (St. Paul & M. T. Co. <i>v.</i>)	248
French <i>v.</i> Ginsburg	264	Johnson <i>v.</i> Johnson	100
Frost <i>v.</i> St. Paul B. & I. Co. .	325	Johnson (Ward <i>v.</i>)	301
Fuller (Pioneer S. & L. Co. <i>v.</i>)	60	Jones <i>v.</i> Swain	251
Gates <i>v.</i> Ege	465	Kaje <i>v.</i> Chicago, St. P., M. & O. Ry. Co.	422
Gieriet (Long <i>v.</i>)	278	Kelly <i>v.</i> Minneapolis City . .	294
Ginsburg (French <i>v.</i>)	264	Kennedy <i>v.</i> Chicago, M. & St. P. Ry. Co.	227
Gladson (State <i>v.</i>)	385	Kennedy (Turner <i>v.</i>)	104
Glynn's Estate (In re)	21	Kimball P. Co. <i>v.</i> Southern L. I. Co.	37
Grundysen <i>v.</i> Polk Co. . . .	212	Kothe (Quelprud <i>v.</i>)	114
Hager (Pioneer Fuel Co. <i>v.</i>) . .	76	Kruse (Potsdamer <i>v.</i>)	198
Halverson <i>v.</i> Chicago, M. & St. P. R. Co.	142	Lake Pleasant (Tessier <i>v.</i>) . .	145
Hand <i>v.</i> National L. S. Ins. Co.	519	Lambert (Pine County <i>v.</i>) . .	203
Harris <i>v.</i> McKinley	198		

	Page		Page
Lanpher v. Barnum	172	Mitchell v. Chisholm	148, 155
Larson (Nelson r.)	133	Munger v. City of St. Paul	9
Lathrop v. O'Brien	175		
Leck (St. Paul & M. T. Co. v.)	87	National L. S. Ins. Co. (Hand	
Leighton (Douglas v.)	81	v.)	519
Le Sueur Co. (Rogers v.)	434	National Masonic Acc. Assn.	
Life Indem. & Inv. Co. (Col-		(Whitney v.)	472
by v.)	510	Neal v. Northern Pac. R. Co.	365
Lillyblad v. Sawyer	130	Nelson v. Larson	133
L. Kimball P. Co. v. Southern		Nelson v. St. Paul P. Works	43
L. I. Co.	37	Nichols & S. Co. (Oxford v.)	206
Lockerby (State ex rel. v.)	411	Nippolt v. Firemen's Ins. Co.	275
Long r. Gieriet	278	Northern Pac. R. Co. (Neal r.)	365
Lowy (Rees v.)	381	North Star W. M. Co. (Trun-	
Lueck r. St. Paul & D. R. Co.	30	tle v.)	52
Lundin (McMahan r.)	84	Northwestern Consol. Milling	
Lytle v. Prescott	129	Co. (Rothenberger v.)	461
		Norton (Village of West Du-	
McCormick v. Milburn & S. Co.	6	luth v.)	72
McKillop v. Duluth St. Ry. Co.	408	O'Brien (Lathrop v.)	175
McKinley (Harris v.)	198	O'Gorman (Vandiver v.)	64
McLennan v. Minneapolis & N.		Olson r. Cook	552
E. Co.	317	Ortman v. Chute	452
McMahan v. Lundin	84	Otto (Young v.)	307
McMullen v. People's S. & L.		Oxford v. Nichols & S. Co.	206
Ass'n	33		
McMurren (Fitzgerald v.)	312	Pabst Brewing Co. (Schlitz r.)	303
McMurren (Twohy v.)	242	People's S. & L. Ass'n (McMul-	
Madigan (State v.)	425	len v.)	33
Manston (Hawkins r.)	323	Pine County v. Lambert	203
Marshall (Crookston Imp. Co.		Pioneer Fuel Co. r. Hager	76
v.)	333	Pioneer S. & L. Co. v. Fuller	60
Mead v. Sanders	108	Polk County (Grundysen r.)	212
Meyer (Hoffman v.)	25	Potsdamer v. Kruse	193
Milburn & S. Co. (McCormick		Powers v. Chicago, M. & St. P.	
v.)	6	Ry. Co.	332
Miller r. State Bank	319	Prescott (Lytle v.)	129
Minneapolis City (Kelly v.)	294		
Minneapolis & N. E. Co. (Mc-		Quelprud v. Kothe	114
Lennan v.)	317		
Minneapolis T. M. Co. v. Fire-		Rees v. Lowy	381
men's Ins. Co.	35	Register Printing Co. v. Willis	93
Minnesota T. Ins. & T. Co.		Richard (Valerius v.)	443
(Cleghorn v.)	341	Roche (Thoen r.)	135
Minnetonka Village (State ex		Rogers v. Brown	223
rel. v.)	526		

	Page		Page
Rogers v. Truesdale . . .	126	Steele (Heavenrich v.) . . .	221
Rogers v. Le Sueur Co. . .	434	Stewart (Cochran v.) . . .	499
Rothenberger v. Northwestern		Swain (Jones v.) . . .	251
Consol. Milling Co. . . .	461		
Rutherford v. Chicago, M. &		Tagley (Yellow Med. Co. Bank	
St. P. Ry. Co.	237	v.)	391
		Tarbox (Yanish v.) . . .	245
St. Paul, B. & I. Co. (Frost v.)	325	Taylor v. Hess	96
St. Paul City (Egan v.) . .	1	Tessier v. Town of Lake Pleas-	
St. Paul City (Munger v.) .	9	ant	145
St. Paul & D. R. Co. (Lueck		Thoen v. Roche	135
v.)	30	Thomas (Fredette v.) . . .	190
St. Paul & M. T. Co. v. Jenks	248	Thompson (Cargill v.) . . .	534
St. Paul & M. T. Co. v. Leck	87	Thompson's Estate (In re) .	109
St. Paul P. Works (Nelson v.)	43	Town of Lake Pleasant (Tessier	
Sanders (Mead v.)	108	v.)	145
Sawyer (Lillyblad v.) . . .	130	Truesdale (Rogers v.) . . .	126
Schiek (Barge v.)	155	Truntle v. North Star W. M.	
Schlitz v. Pabst B. Co. . .	303	Co.	52
Schultz v. Bower	493	Turner v. Kennedy	104
Schulz v. Chicago, M. & St. P.		Twohy v. McMurran . . .	242
Ry. Co.	271		
Sharvey v. Central V. I. Co. .	216	Union Bank v. Shea . . .	180
Shea (In re)	415		
Shea (Union Bank v.) . . .	180	Valerius v. Richard . . .	443
Sherburne (Davison v.) . .	355	Van Der Horck (Barge v.) .	497
Shipman (Dressel v.) . . .	23	Vandiver v. O'Gorman . .	64
Shirk v. Hoffman	230	Vetter (Eastman v.) . . .	164
Slama v. Chicago, St. P., M.		Village of Minnetonka (State	
& O. Ry. Co.	167	ex rel. v.)	526
Smith (Bank of Commerce v.)	374	Village of Waterville (Blyhl v.)	115
Southern L. I. Co. (L. Kim-		Village of West Duluth v. Nor-	
ball P. Co. v.)	37	ton	72
State Bank (In re)	361	Village of Wykoff v. Healey .	14
State Bank (Miller v.) . . .	319	Vollander (State v.) . . .	225
State v. Connelly	482		
State v. Corbett	345	Ward's Estate (In re) . . .	377
State ex rel. v. Dart . . .	261	Ward v. Johnson	301
State v. Gladson	385	Waterville Village (Blyhl v.)	115
State ex rel. v. Lockerby . .	411	Webb v. Fisher	441
State v. Madigan	425	West Duluth Village v. Norton	72
State ex rel. v. Minnetonka Vil-		Westfall (Forepaugh v.) . .	121
lage	526	Whitney v. National Masonic	
State v. Vollander	225	Acc. Assn.	472
Steele v. Anheuser-Busch B.		Willis (Register P. Co. v.) .	93
Ass'n	18	Wolford v. Bowen	267

CASES REPORTED.

ix

	Page		Page
Woodbridge v. Duluth City	256	Yellow Me. Co. Bank v. Tag-	
Wood Harvester Co. v. Jeffer-		ley	391
son	456	Younggren (Haugen v.) . . .	170
Wykoff v. Healey	14	Young v. Otto	307
Yanish v. Tarbox	245	Zelch (Elgin City B. Co. v.) .	487

*

CASES CITED BY THE COURT.

I. CASES FROM MINNESOTA REPORTS.

	Page		Page
Alden v. City of Minneapolis, 24 Minn. 254.	118	Goodnow v. Board of Com'rs, 11 Minn. 31.	440
Aldrich v. Wetmore, 52 Minn. 164.	424	Grace v. Michaud, 50 Minn. 139.	166
Atkinson v. Nash, 56 Minn. 472.	361	Grant v. Wolf, 34 Minn. 32.	235
Balch v. Wilson, 25 Minn. 299.	91	Greene v. Minneapolis & St. L. Ry. Co., 31 Minn. 248.	306
Barber v. Kennedy, 18 Minn. 216.	189	Green v. St. Paul. M. & M. Ry. Co., 55 Minn. 192.	28
Barker v. Todd, 37 Minn. 370.	446	Greenman v. Smith, 20 Minn. 418.	41
Barry v. McGrade, 14 Minn. 286.	169	Griffin v. Chadbourn, 32 Minn. 126.	407
Beardsley v. Crane, 52 Minn. 537.	140	Griffin v. Jorgenson, 22 Minn. 92.	397
Becker v. Northway, 44 Minn. 61.	93	Gude v. Exchange Fire Ins. Co., 53 Minn. 220.	480
Bengtson v. Chicago, St. P. M. & O. Ry. Co., 47 Minn. 486.	274	Hammel v. Beardsley, 31 Minn. 314.	377
Bergh v. Sloan, 53 Minn. 116.	446	Hatch v. Coddington, 32 Minn. 92.	524
Boon v. State Ins. Co., 37 Minn. 426.	524	Hennepin Co. v. Bartleson, 37 Minn. 343.	300
Bowen v. Haskell, 53 Minn. 480.	384	Hicks v. Stone, 13 Minn. 434.	384
Brakken v. Minneapolis & St. L. Ry. Co., 29 Minn. 43.	495	Hosford v. Rowe, 41 Minn. 247.	100
Carpenter v. City of St. Paul, 23 Minn. 232.	300	Ingalls v. St. Paul. M. & M. Ry. Co., 39 Minn. 479.	63
Chaska Co. v. Board Sup'rs Carver Co., 6 Minn. 204.	440	In re People's L. S. Ins. Co., 56 Minn. 180.	557
Chute v. State, 19 Minn. 271.	495	In re Shotwell, 49 Minn. 187.	421
Cole v. Hutchinson, 34 Minn. 410.	236	Jellett v. St. Paul. M. & M. Ry. Co., 30 Minn. 265.	66
Columbia Electric Co. v. Dixon, 46 Minn. 463.	458	Johnson v. Chicago, M. & St. P. Ry. Co., 29 Minn. 425.	28
Conger v. Nesbitt, 30 Minn. 436.	189	Johnston v. County of Becker, 27 Minn. 64.	438
Cooper v. Reaney, 4 Minn. 528.	189	Jones v. Rigby, 41 Minn. 530.	550
County of Red Wood v. Winona & St. P. L. Co., 40 Minn. 512.	206	Kausal v. Minnesota F. M. F. Ins. Ass'n, 31 Minn. 17.	478, 480, 481
Cushman v. Com'rs Carver Co., 19 Minn. 295.	440	Kipp v. Johnson, 31 Minn. 360.	206
Doyle v. St. Paul, M. & M. Ry. Co., 42 Minn. 79.	144	Lauthenschlager v. Hunter, 22 Minn. 267.	95
Eastman v. Vetter, 57 Minn. 164.	231	Laybourn v. Seymour, 53 Minn. 105.	91
Eder v. Reilly, 48 Minn. 437.	84	Lee v. City of Minneapolis, 22 Minn. 13.	118
Erickson v. St. Paul & D. R. Co., 41 Minn. 500.	274	Leithauser v. Baumeister, 47 Minn. 151.	360
Evans v. Winona L. Co., 30 Minn. 515.	20	Lyberg v. Northern Pac. R. Co., 39 Minn. 15.	465
Evison v. Chicago, St. P. M. & O. R. Co., 45 Minn. 370.	274	McCall v. Bushnell, 41 Minn. 37.	209
Foster v. Minnesota Cent. Ry. Co., 14 Minn. 360.	370	McGrath v. Cannon, 55 Minn. 457.	191, 196
Gebhard v. Eastman, 7 Minn. 56.	561		
Gilbert v. Emerson, 55 Minn. 254.	293		
Gillilan v. Chatterton, 38 Minn. 335.	205		

	Page		Page
Mackey v. Peterson, 29 Minn.	298, 394	State v. Bank of New England, 55	557
Marson v. Deither, 49 Minn.	427, 459	Minn. 139,	
Merchants Nat. Bank v. Stanton,		State ex rel. v. Board of Public	
55 Minn. 211,	63	Works, 27 Minn. 412,	301
Mississippi & R. R. Co. v.		State ex rel. v. Cooley, 56 Minn.	
Prince, 34 Minn. 71,	549	540,	49
Mitchell v. McFarland, 47 Minn.		State ex rel. v. District Court, 33	
535,	401	Minn. 295,	300
Morrison v. Lovejoy, 6 Minn.	319, 324	State v. Donaldson, 41 Minn. 74,	349
Moser v. St. Paul & D. R. Co., 42		State v. Dowlan, 33 Minn. 538,	414
Minn. 480,	28	State ex rel. v. Madison, 43 Minn.	
Mosness v. German-Am. Ins. Co.,		438,	300
50 Minn. 341,	524	State v. Mims, 26 Minn. 183,	324
Mower Co. v. Crane, 51 Minn. 201,	206	State ex rel. v. Minneapolis & St.	
Mueller v. Barge, 54 Minn. 314,	497	L. Ry. Co., 39 Minn. 219,	296
Mulvey v. Tozer, 40 Minn. 384,	205	State v. Parrant, 16 Minn. 178,	433
Munger v. Com'rs Carver Co., 10		State v. Peterson, 50 Minn. 239,	203
Minn. 133,	440	State ex rel. v. St. Paul, M. & M.	
		Ry. Co., 35 Minn. 131; 38 Minn.	
Nichols v. City of Duluth, 40 Minn.		246,	296, 297
389,	496	State v. Young, 23 Minn. 551,	288
Nichols v. Walter, 37 Minn. 264,	50	Stern v. Hayner, 56 Minn. 93,	383
		Stout v. Stoppel, 37 Minn. 56,	63
Pace v. Chadderdon, 4 Minn. 499,	550	Tabor v. City of St. Paul, 36 Minn.	
Parker v. Truesdale, 54 Minn. 241,	297	188,	118
Peckham v. Gilman, 7 Minn. 446,	288	Trainor v. Worman, 34 Minn. 237,	524
Porter v. Chandler, 27 Minn. 301,	446	Tripp v. Northwestern Nat. Bank	
Potsdammer v. Kruse, 57 Minn. 193,	191	45 Minn. 383,	91
Potter v. Mellen, 36 Minn. 122,	41	Turner v. Holleran, 8 Minn. 451,	271
Rippe v. Becker, 56 Minn. 100,	349		
Robinson v. Great Northern Ry.		Voak v. National Invest. Co., 51	
Co., 48 Minn. 445,	297	Minn. 450,	524
Rogers v. Benton, 39 Minn. 39,			
543,	551	Wakefield v. Day, 41 Minn. 344,	401
Rogers v. City of St. Paul, 22		Walter A. Wood H. Co. v. Rob-	
Minn. 494,	300	bins, 56 Minn. 48,	458
		Ward v. Johnson, 51 Minn. 480,	395
St. Paul & D. R. Co. v. Blackmar,		Warner v. Kennine, 25 Minn. 173,	63
44 Minn. 514,	254	Washington Life Ins. Co. v. Mar-	
St. Paul, S. & T. F. R. Co. v. Rob-		shall, 56 Minn. 250,	153
bins, 23 Minn. 439,	450	Watier v. Chicago, St. P. M. & O.	
Schmid v. County of Brown, 44		Ry. Co., 31 Minn. 91,	28
Minn. 67,	215	Western L. Ass'n v. McComber, 41	
Schwab v. Rigby, 38 Minn. 395,	288	Minn. 20,	400
Schwab v. Pierro, 43 Minn. 520,	285	White v. Miller, 52 Minn. 367,	174
Shartle v. City of Minneapolis, 17		Whitney v. National Masonic Acc.	
Minn. 308,	118	Ass'n, 52 Minn. 378,	478
Sherman v. Clark, 24 Minn. 43,	266	Wilder v. Peabody, 37 Minn. 248,	124
Simmons v. Anderson, 44 Minn.		Willis v. Mabon, 48 Minn. 140,	300
487,	86	Willoughby v. Irish, 35 Minn. 63,	359
Smith v. Park, 31 Minn. 70,	108		
Solomon v. Vinson, 31 Minn. 205,	77	Yanish v. City of St. Paul, 50	
Sperry v. Goodwin, 44 Minn. 207,	401	Minn. 518,	13
State Bank v. Heney, 40 Minn. 145,	75	Yanish v. Tarbox, 49 Minn. 268,	245

II. OTHER CASES.

Abadie v. Carrillo, 32 Cal. 172,	77	Barbour v. National Exch. Bank,	
Abraham v. North German Ins.		50 Ohio St. 90,	92
Co., 40 Fed. Ren. 717,	480	Burdick v. People, 149 Ill. 600,	353
Ackart v. Lansing, 6 Hun. 476,	448	Buxton v. Edwards, 134 Mass. 567,	360
Armory v. Delamire, 1 Smith Lead.			
Cas. 374,	67	Carr v. Hamilton, 129 U. S. 252,	92
Astor v. Hoyt, 5 Wend. 603,	543	Case v. People, 76 N. Y. 242,	431

	Page		Page
Cathrow v. Hagger, 8 East 106,	77	James v. Cincinnati H. & D. R.	
Chandler v. Coe, 56 N. H. 184,	32	Co., 2 Disney, 261,	460
Cheatham v. Roberts, 23 Ark. 651,	450	Jermain v. Pattison, 46 Barb. 9,	125, 126
Chicago & A. R. Co. v. People, 105			
Ill. 857,	390	Johnson v. Sherman, 15 Cal. 287,	543
Chicago & N. W. Ry. Co. v. Mo-		Jones v. State, 13 Tex. 168,	432
randa, 93 Ill. 302,	372	Journey v. Brackley, 1 Hilt. 454,	125, 126
Clarke v. Continental Imp. Co., 57			
Ind. 135,	460	Kenniston v. Avery, 16 N. H. 117,	360
Clement v. Clement, 69 Wis. 599,	360	Kentucky F. Co.'s Assignee v.	
Cooper v. Mullins, 30 Ga. 150,	372	Merchants' Nat. Bank, 90 Ky.	225,
Copeland v. Stephens, 1 Barn. &			91
A. 593,	124	King v. Morris, 1 Leach 50, 2 Bur-	
Deitz v. Providence-W. Ins. Co.,		row, 1189,	430
31 W. Va. 851,	480	Lattimer v. Hill, 8 Hun, 171,	448
Donohoe v. Gamble, 38 Cal. 340,	344	Lewis v. New York & N. E. R. Co.,	
Dutton v. Warschauer, 21 Cal.		153 Mass. 73,	464
609,	543	Lowber v. Connit, 36 Wis. 176,	201
Eaton v. Jaques, 2 Doug. 460,	551	McClelland v. West, 70 Pa. St. 183,	69
Emmerich v. Hefferan, 33 Hun, 54,	446	McGuire v. Grant, 25 N. J. Law,	
Farr v. Fuller, 8 Ia. 347,	450	362,	496
Farwell v. Boston & W. R. Co.,		Madden v. Chesapeake & O. Ry.	
4 Met. (Mass.) 49,	370, 371	Co., 28 W. Va. 610,	372
Fellows v. Smith, 130 Mass. 378,	100	Maier v. Homan, 4 Daly 168,	448
Fenton v. Ellis, 6 Taunt. 192,	77	Mandeville v. Marvin, 30 Hun, 282,	
Fera v. Wickham, 135 N. Y. 223,	92		447, 448
Fitzgerald v. New Brunswick, 47		Merwin v. Austin, 58 Conn. 22,	92
N. J. Law, 484,	51	Moffatt v. Smith, 4 N. Y. 126,	543
Foley v. Wyeth, 2 Allen. 131,	496	Nashville T. Co. v. Fourth Nat.	
Foster v. McKinnon, L. R. 4 C. P.		Bank, 91 Tenn. 336,	92
704,	394	Nichols v. Rensselaer Co. M. Ins.	
Fry v. State, 63 Ind. 552,	353	Co., 22 Wend. 125,	492
Galpin v. Critchlaw, 112 Mass. 339,	32	Norris v. Harris, 15 Cal. 226,	196
Gates v. Fisk, 45 Mich. 522,	360	Onkes v. Munroe, 8 Cush. 282,	166
Gilmore v. Driscoll, 122 Mass. 199,	496	O'Reilly v. People, 86 N. Y. 154,	431
Gordon v. Tucker, 6 Me. 247,	492	Orton v. Noonan, 27 Wis. 277,	163
Gosch v. Association, 44 Ill. App.		Packard v. Dorchester Mut. Ins.	
263,	480	Co., 77 Me. 144,	480
Hadley v. Baxendale, 9 Exch. 341,	548	Parker v. Hannibal & St. J. R. Co.,	
Hahn v. Assurance Co., 23 Oregon,		109 Mo. 362,	372
576,	480	People v. Fire Com'rs, 73 N. Y. 437,	5
Hall v. First Nat. Bank, 133 Ill.		Pierce v. The People, 106 Ill. 11,	480
234,	186	Priestley v. Fowler, 3 Mees. & W. 1,	309
Hanson v. Stevenson, 1 Barn. &		Ragsdale v. Northern Pac. R. Co.,	
A. 303,	124	42 Fed. Rep. 383,	372
Hartford P. Ins. Co. v. Harmer, 2		Rary v. Thompson, 12 Cush. 281,	380
Ohio St. 452,	277	Reg. v. Turner, 2 Car. & Kir. 732,	431
Hawkins v. Long, 74 N. C. 781,	69	Relyea v. Kansas City Ft. S. & G.	
Hill v. Hibernia Ins. Co., 10 Hun,		R. Co., 112 Mo. 86,	373
26,	277	Riley v. Gerrish, 9 Cush. 104,	270
Home Life Ins. Co. v. Dunn, 20		Ryan v. Harrow, 27 Ia. 494,	433
Ohio St. 175,	32	Sage v. Ensign, 2 Allen, 245,	360
Hough v. Railway Co., 100 U. S.		St. John v. Kidd, 26 Cal. 267,	448
213,	464	Schaub v. Hannibal & St. Jo. R.	
Hutchinson v. Chicago & N. W.		Co., 106 Mo. 74,	373
Ry. Co., 37 Wis. 600,	201	Schuler v. Israel, 120 U. S. 506,	92
Illinois Cent. R. Co. v. People, 143		Schweitzer v. Connor, 57 Wis. 179,	201
Ill. 434,	390	Scott v. Armstrong, 146 U. S. 499,	92
In re Hennen, 13 Pet. 255,	5	Smith v. Castles, 1 Gray 108,	32
Insurance Co. v. Williams, 39 Ohio			
St. 584,	480		

	Page		Page
Smith v. Wabash. St. L. & P. Ry.	372	United States v. Grottkau, 30 Fed.	429
Co., 92 Mo. 359,		Rep. 672,	
Spencer's Case, 1 Smith Lead. Cas.	550, 551		
77,		Vilas v. Dickinson, 13 Wis. 488,	201
Standard Oil Co. v. Amazon Ins.	448		
Co., 79 N. Y. 506,	432	Wagoner v. Paterson G. L. Co., 23	
State v. Bullard, 16 N. H. 139,		N. J. Law, 283,	92
Stone v. Hawkeye Ins. Co., 68 Ia.	480	Wall v. Des Moines & N. W. Ry.	
737,		Co., 89 Ia. —,	144
Sullivan v. Missouri Pac. Ry. Co.,	372	Walters v. Walters, 73 Ind. 425,	69
97 Mo. 113,		Watson v. Peters, 26 Mich. 508,	293
Tappan v. Kimball, 30 N. H. 136,	360	Welch v. Myers, 4 Camp. 348,	124
Tate v. Clements, 16 Fla. 339,	360	Wheeler v. Bramah, 3 Camp. 340,	125
Tift v. Horton, 53 N. Y. 377,	377	White v. Thomas, 75 Mo. 454,	126
Toledo, W. & W. Ry. Co. v. O'Con-		Williams v. Bosanquet, 1 Brod. &	
nor, 77 Ill. 391.	372	B. 238,	551
Turner v. Marriott, L. R. 3 Eq. 744,	154		

STATUTES CITED, CONSTRUED, ETC.

REVISED STATUTES (1858.)

Ch. 69. Art. 2, 189 | Ch. 80, § 1, 414

GENERAL STATUTES (1866.)

Ch. 122, 414

GENERAL STATUTES (1878.)

Ch. 8, § 85,	438	Ch. 67, §§ 2, 3,	42
Ch. 10, § 75,	146	Ch. 67, § 8,	451
Ch. 11, § 29,	400	Ch. 69, § 2,	20
§§ 49, 114,	438	Ch. 70, § 11,	218
§§ 58, 59,	214	Ch. 73, § 36,	361
Ch. 33, §§ 14, 21,	561	Ch. 75, § 40,	166, 231
Ch. 34, §§ 415-420,	557, 560	Ch. 76,	557, 558
Ch. 39, § 22,	86	Ch. 70, § 9,	329
Ch. 41, §§ 10, 11,	20, 383	Ch. 79,	414
Ch. 46, § 3,	455	Ch. 81, §§ 13, 14,	470
Ch. 48, § 1,	455	Ch. 86, § 5,	40
Ch. 65, § 20,	31	§ 7,	41
Ch. 66, §§ 5, 12,	205, 206	§ 10,	40
§ 67, subd. 3,	270	Ch. 117, § 11,	348
§ 253, subds. 5, 7,	445, 448		

SESSION LAWS (General.)

1881, ch. 77, § 3,	250	1889, ch. 200, § 10,	408
ch. 135,	205	1891, ch. 4, § 57,	47
1881, (Ex. Sess.) ch. 84, § 3,	364	ch. 4, § 96,	46
1883, ch. 114,	394	ch. 146, subch. 9, § 4,	74, 75
1885, ch. 2, §§ 5, 6,	214	1893, ch. 51,	31
1885, ch. 53,	361	ch. 60,	389
ch. 145,	531	ch. 66, § 2,	348
1889, ch. 46, § 64,	456	ch. 150,	205
ch. 152, § 1,	364	ch. 210,	49
ch. 170, § 3,	146		

SESSION LAWS (Special.)

1885, ch. 5,	296, 300	1891, ch. 53,	188
1887, ch. 2, subch. 9, § 9,	257	ch. 55, § 35,	257
1889, ch. 64, § 6,	3		

v.57 M.

(xv)†

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF MINNESOTA.

PATRICK EGAN *vs.* CITY OF ST. PAUL *et al.*

Argued Jan. 12, 1894. Reversed Feb. 26, 1894.

No. 8498.

Duration of office of an appointee.

The committee having charge of the combined courthouse and city hall building in the city of St. Paul, under the provisions of Sp. Laws 1889, ch. 64, § 6, and authorized to appoint a janitor, a custodian, and such other employes as may be deemed necessary, has no power to appoint any of these employes for a period of time extending beyond the year for which the appointive members of said committee are themselves appointed.

Appeal by defendants, the City of St. Paul and the Board of County Commissioners of Ramsey County, from an order of the District Court of said county, *John W. Willis* and *Charles D. Kerr*, JJ., entered, July 10, 1893, denying their motion for a new trial. The case is stated in the opinion.

Leon T. Chamberlain, City Attorney, *Pierce Butler*, County Attorney, and *Hermon W. Phillips*, for appellants.

Egan was a public officer and no term of office being fixed by the statute under which he held, he was removable at pleasure by the committee appointing him. *State v. Alt*, 26 Mo. App. 673; *People ex rel. v. Whitlock*, 92 N. Y. 191; *People ex rel. v. Fire Commission*.—1

ers, 73 N. Y. 437; *People ex rel. v. Robb*, 126 N. Y. 180; *Carr v. State*, 111 Ind. 101; *Ex parte Hennen*, 13 Pet. 225; *State ex rel. v. Somers*, 35 Neb. 322; *State ex rel. v. Smith*, 35 Neb. 13.

Where the power of appointment is conferred in general terms and without restriction the power of removal, in the discretion and at the will of the appointing power, is implied and always exists unless restrained and limited by some other provision of law. *Bergen v. Powell*, 94 N. Y. 591; *Ex parte Hennen*, 13 Pet. 230; *Laimbeer v. Mayor*, 4 Sandf. 109; *Avery v. Inhabitants of Tyringham*, 3 Mass. 159; *Blake v. United States*, 103 U. S. 227; *People ex rel. v. Thompson*, 94 N. Y. 451; *People v. Mayor of N. Y.*, 5 Barb. 43.

It is contrary to public policy under our form of government to permit the appointment to office for a term extending beyond the term of those making the appointment. The same is also true respecting the making of contracts to accomplish the same purpose. 1 Dillon Municipal Corp., § 89; *Trowbridge v. Newark*, 46 N. J. Law, 140; *Kirkham v. Russell*, 76 Va. 956; *Stevenson v. School Directors*, 87 Ill. 255; *Davis v. School Directors*, 92 Ill. 293; *Board of Com'rs v. Taylor*, 123 Ind. 148.

C. D. O'Brien, for respondent.

The plaintiff was not a public officer. He gave no bond, he took no official oath, he executed no public function or trust. He was nothing more than the head janitor of the building, and the performance of his duties involved no public function. It is difficult to understand why the committee were not authorized to fix the term of service as well as the other conditions pertaining to the employment, and if they did so in the exercise of a sound discretion the court will sustain their contract, unless it is shown to be, either contrary to the law, or to public policy, or unreasonable. Sp. Laws 1889, ch. 64.

It is not contrary to public policy for a municipal corporation, public body or officer to enter into a contract for a term exceeding the term of office of the particular persons acting on behalf of such municipal corporation, public body or officer. If it were, all contracts such as the leasing of buildings or grounds for public purposes, contracts for public improvements, for supplies of any de-

scription, such as furnishing water, lighting a city, or any other contract necessary to be made on behalf of municipal corporations, whether the same be state, county, city or township organizations, would be so limited. It is not asserted here that this contract is unjust, unnecessary, immoral or unreasonable. How then can it be contrary to the public policy? *Bennett v. Morton*, 46 Minn. 113; *Lilley v. Elwin*, 11 Q. B. 742; *Vail v. Jersey L. F. Mfg. Co.*, 32 Barb. 564.

COLLINS, J. By Sp. Laws 1889, ch. 64, § 6, it was provided that, when completed, the combined courthouse and city hall building in the city of St. Paul should be under the charge of a committee of seven, namely, the mayor of the city; three members of the city council, to be appointed annually by the president of said council; and three members of the board of county commissioners, to be appointed annually by the chairman of the board. This committee was given "power to appoint such janitor, custodian and other employes as they shall deem necessary for the proper care and management of said building, and at such compensation as said committee shall determine." At a meeting of this committee held May 29, 1891, the following was adopted: "Resolved, that we proceed to elect a custodian and chief engineer for two years, term commencing June 1, 1891, to June 1, 1893." The plaintiff was chosen as custodian at the same meeting, and his salary fixed at \$1,800 per annum; and on June 1, 1891, he entered upon the discharge of his duties. July 1, 1892, the committee, by resolution, reduced the salary of custodian to \$1,200 per year; and on July 29th one Bigue was by said committee appointed such custodian, commencing August 1st. Bigue relieved plaintiff on the day last named, and the latter has not acted as custodian since that day, although alleging in his complaint a readiness and willingness to do so; and this action was brought to recover salary, at the rate of \$1,800 per annum, for five months, commencing with August, 1892. The question involved is the right of the committee to drop the plaintiff, as custodian of the building, after he had served fourteen months, and to appoint another custodian. It is the contention of plaintiff's counsel that by the adoption of the resolution on May 29, 1891, whereby it was resolved that a custodian be elected

for a two-years term, plaintiff's election as such custodian, and acceptance of the place by entering upon the discharge of his duties, a contract for the full period of two years was entered into, which could not be terminated by either party without good cause shown, and it was not claimed that good cause existed in the present case. Evidently, the court below took this view, when ordering judgment in plaintiff's favor for five months' salary, at \$1,800 per year, and adhered to it when denying defendants' motion for a new trial.

It will be noticed that although the committee is a continuing one, and, to be eligible to it, a person must be mayor of the city, or a member of certain official bodies, the *personnel* thereof may change every year, except the mayor, who holds that office for two years, and, as a consequence, serves upon the committee for the same length of time. Should a mayor be re-elected, he would serve on the committee more than two years; and, should a reappointment be made by the president of the council or by the chairman of the board, an alderman or a commissioner might serve more than one year. But, under the charter provisions, there might be six new men on the committee every year, and the entire committee might be composed of new men every second year. Therefore, the rule established by the decision of the lower court is that public officers upon whom is devolved the duty of selecting persons to render daily routine services, of a very common character, about a public building, have the power to enter into contracts with these persons, which, both as to terms of service and compensation, will bind the public, and will deprive their successors in office from making any changes, except for such causes as would relieve the master from the obligations of a contract entered into with a servant. No authority can be found which will sustain such a rule of law. Should this doctrine prevail, the committee in question could have contracted with plaintiff for his services as custodian for a period of three, four, or five years, as well as for two years. The term of years, and the compensation to be paid, would, if the right be conceded at all, necessarily be within the somewhat unlimited discretion of the committee. Authorized to appoint a janitor, a custodian, and, in general language, such other employes as may be deemed necessary, the committee could, on any day during the

year, enter into a time contract with any employé, from janitor down to scrub woman, for no distinction can be made, based upon the kind of work performed by the employé. If a custodian can be permitted to bind the public with a contract, so can the most menial employé about the premises.

Under this doctrine, places, with excessive salaries attached, could be made for a host of political friends by the members of an outgoing committee; and their successors would be powerless,—practically unable to change the force, or to drop persons not needed, or to reduce their compensation. A rule of this kind in the public service would prove intolerable. It is not even the law relating the public officers, for, where the tenure of an appointive office is not prescribed by the constitution or by statute, the appointee holds at the will of the appointing power and of himself, and he may be removed by the former at pleasure. *In re Hennen*, 13 Pet. 255; *People v. Fire Com'rs*, 73 N. Y. 437. The cases on this proposition are collated in 19 Am. & Eng. Enc. Law, 562, note f.

The charter provisions under consideration contemplate, undoubtedly, an annual reorganization of the committee which is to have charge of the public building, and that the members comprising this committee from year to year shall exercise full power, and have complete control over it during the time for which they serve. To have charge and exercise control over the building, the committee must be given full power, within reasonable limits, of course, to determine the number and kind of employés needed, in addition to the janitor and custodian, to select all employés, and to fix their compensation. The facts here do not require us to decide whether a committee may at pleasure dismiss an employé, and we simply hold that the committee in charge for the municipal year ending in June, 1892, could not in any manner select or designate a custodian for any portion of the subsequent year.

There is a class of cases in which the employment of a person—such, for illustration, as a teacher—for a period beyond the terms of office of the members of the board or committee making the contract is upheld. The result here is not opposed to that class.

The order appealed from is reversed, and, on the remanding of the case, judgment may be entered for defendants.

(Opinion published 58 N. W. 267.)

ROBERT L. McCORMICK *et al.* vs. MILBURN & STODDARD CO.

Argued Jan. 30, 1894. Affirmed April 6, 1894.

No. 8459.

Contract construed.

Certain provisions respecting a railway track to a warehouse, found in a lease of real property, construed. *Held*, that the landlords were not liable for extra expenses incurred by the tenant in doing business while railway privileges were suspended through no fault of the former.

Claim not supported by the evidence.

Held, upon an examination of the record, that the evidence failed to show, as contended by the tenant, that its claim for reimbursement on account of said extra expense had been admitted and allowed upon a settlement with the landlords.

Appeal by defendant, the Milburn-Stoddard Company, a corporation, from an order of the District Court of Hennepin County. *Thomas Canty, J.*, made September 5, 1893, denying its motion for a new trial.

The plaintiffs, Robert L. McCormick and Elias J. Woolf, on October 22, 1886, leased to defendant for five years their six story building on the corner of Third Avenue and Third Street in Minneapolis at an annual rental of \$9,000 payable in monthly installments. This action was to recover \$3,174 rent in arrear. Defendant for answer interposed a counterclaim for \$2,938.56 damages for interruption of access by railroad track, and claimed that plaintiffs had allowed the claim and agreed to apply it upon the rent. At the trial and after the evidence was all submitted the plaintiff moved the court to dismiss the counterclaim and direct the jury to return a verdict for plaintiffs for the rent as claimed. The motion was granted and verdict rendered. Defendant duly excepted and moved for a new trial. Being denied, it appeals.

Reed & Dougherty, for appellant.

Jackson & Atwater, for respondents.

COLLINS, J. This was an action to recover rent for the use of a warehouse which had railway track privileges. While the building was under construction, the plaintiffs, as owners, entered into a

written agreement with defendant for a five-years lease, and at a later period, when the lease itself was executed, the agreement was expressly made a part of it. That portion of the agreement on the part of the landlords which is pertinent to this controversy is as follows: "Will also make continuation of track privilege a part of the lease; and, providing same has to be lowered so as to unload in the basement instead of first floor, we will do that at our own expense, and make doors or archways in the basement correspond with those now on the first floor." By the lease the plaintiffs demised, leased, and let unto defendants the warehouse with appurtenances and privileges, "including railway track privileges as now laid" on the premises. The plaintiffs also stipulated therein to "lower the railway track privilege on said premises, providing it becomes necessary to do so, according to the terms of" the agreement for the lease. When these writings were executed, both parties expected that the general system of railway tracks in that vicinity would be changed by lowering, and of necessity the warehouse track would be interfered with, and have to be lowered, with its connections.

The defendant tenant occupied the leased property for the full term agreed on, and during this time the tracks were lowered, but owing to a delay in performing the work on the main tracks, for which neither of these parties was responsible, the tenant was deprived of railway privileges and connections for a much longer period of time than was anticipated, and was thereby compelled to expend quite a large sum of money for draying and other extra labor about its business. Insisting upon its right to withhold this sum from plaintiffs, it counterclaimed for the amount in its answer in this action.

The plaintiffs contended upon the trial that the only obligation resting on them under the lease was to lower the warehouse or side track, to put in the proper doors or archways in the basement, and, as soon as practicable, to connect that track with the main railway lines as lowered; and that, having promptly done all of this, they were entitled to the agreed rental. The court below took that view of the case, and the principal question for determination is whether, under the terms of the lease, the landlords were required to reimburse their tenant for such extra expense as was necessarily

incurred in conducting the latter's business while the main tracks, over which the former had no control, were being lowered by the railway company. We are of the opinion that the landlords were not liable for any part of these expenditures.

There was no covenant in the lease for an uninterrupted use of the track, or for railway privileges at the warehouse, for the full period of five years. In fact, both parties anticipated that the track would have to be lowered, and the use of it temporarily suspended, at some time during the life of the lease, and, with this in view, expressly provided for it by stipulating that, should a change of track become necessary, the landlords should not only do the work at their own expense, but should also make certain alterations in the basement, so as to render the newly-located track available. Obviously, the plain provisions in this matter, found in each of the written instruments, preclude all claim that the uninterrupted use of the railway privileges during the whole term, or reimbursement for extra labor in case of suspension, was contemplated by either party, and conclusively dispose of the tenant's contention that track privileges were intended to be, or were, guarantied or warranted by the landlords for the whole term. Had there been such a guaranty or warranty, expressly or by implication, the landlords' obligation to lower the track and to fit the basement for use would have arisen without provision therefor. Neither party would have thought it essential to fasten, by express stipulation, the duty of making the changes upon the landlords, for it would have been fixed by law.

There is nothing in defendant's claim that the case should have been submitted to the jury upon the proofs relative to a settlement of the controversy and a statement of account between the parties. The testimony showed that, without regard to their legal rights under the lease, the plaintiffs felt inclined to make an allowance to defendant on account of the extra expense, and there was more or less conversation and negotiation on the subject. But on all occasions the plaintiffs questioned the correctness of the claim as presented, and insisted upon further and detailed information respecting the amounts said to have been paid out. This information was promised but was not furnished. The plaintiffs never acquiesced in the correctness of the charge as made, but in fact disputed

it. They never admitted a legal liability on account of the claim, but always questioned it. Under such circumstances there was nothing, by way of an account stated or otherwise, which approached a settlement and allowance of the demand in controversy. Order affirmed.

CANTY, J., having tried the case while District Judge, took no part herein.

(Opinion published 58 N. W. 600.)

ROBERT C. MUNGER *vs.* CITY OF ST. PAUL.

Submitted on briefs Jan. 10, 1894. Affirmed April 6, 1894.

No. 8556.

Rights and powers of a city in the control and improvement of its streets.

In the control and improvement of its public streets a municipal corporation, in the absence of any lawful restriction or regulation to the contrary, has the same rights and powers as a private owner has over his own land, and, as to abutting owners, is subject to the same liabilities.

Evidence as to damages reviewed.

Held, that in this case there was no evidence introduced or received upon the trial on which the jury could have awarded damages to plaintiff, an abutting property owner, alleged to have been caused by a permanent alteration of the established grade on a part of the street in front of his lots.

Appeal by plaintiff, Robert C. Munger, from an order of the District Court of Ramsey County, *J. J. Egan, J.*, made June 20, 1893, denying his motion for a new trial.

Plaintiff owns vacant lots ten, thirteen, fourteen, fifteen, sixteen, seventeen and eighteen, in Munger's subdivision of block thirty-three in Arlington Hills Addition in St. Paul. The lots are on a sidehill and front south down hill onto Wells street, between Greenbriar avenue on the west and Walsh avenue on the east. These avenues cross Wells street at right angles. In 1892, the city graded

the street and avenues adjoining this block to their full width. The north line of Wells street was graded down about twenty feet below the natural surface of the ground. The front of the lots was thus deprived of lateral support and a considerable part of their surface slid down into the street and was removed by the contractor. The city built a retaining wall in the center of the street parallel with it and graded the south half of the street on a level fifteen feet below the level of the north half.

The plaintiff brought this action to recover damages, (1st,) for the falling away of the front of his lots, (2nd,) for the change in the grade on the south half of the street and the construction of the center wall. On the trial, May 10, 1893, the Judge charged the jury that plaintiff was entitled to compensation for the first, but not for the second. The jury returned a verdict for plaintiff and assessed his damages at \$420. He moved for a new trial for errors in law and on the ground that the damages were grossly inadequate. Being denied he appeals.

Humphrey Barton, for appellant.

The city charter provides for the establishment of grades and for the changing of an established grade. Sp. Laws 1887, ch. 7, subch. 7, Title 3. The proviso in the charter for assessment of damages for a change of grade, gives a right to recover damages in this case. *McCarthy v. City of St. Paul*, 22 Minn. 527; *Taylor v. City of St. Paul*, 25 Minn. 129; *Dore v. City of Milwaukee*, 42 Wis. 108; *Smith v. City of Eau Claire*, 78 Wis. 457.

The city constructed the south half of Wells Street fifteen feet below the established grade of the street. This deprived plaintiff of the use of one half the width of the street in front of his lots. For this he is entitled to recover damages. Plaintiff had an easement in the lower half of the street which easement was appurtenant to his land and the grading of the lower roadway and building of the retaining wall along the middle of the street was such an interference with plaintiff's fee in the north half and easement in the south half of the street as gives him a right to recover damages. *Wilder v. De Cou*, 26 Minn. 10; *Brakken v. Minneapolis & St. L. Ry. Co.*, 29 Minn. 41; *Adams v. Chicago B. & N. Ry. Co.*, 39 Minn. 286.

Leon T. Chamberlain, City Attorney, for respondent.

The streets in question are conceded to be public streets with established grades. The city therefore had a right to enter upon them and grade them or work them and make them passable. The city has the same rights in its streets that a private owner has in his property. *O'Brien v. City of St. Paul*, 25 Minn. 331; *St. Anthony Falls W. P. Co. v. King*, 23 Minn. 186; *Rich v. City of Minneapolis*, 37 Minn. 423; *Viliski v. City of Minneapolis*, 40 Minn. 304.

The city cannot be held for damages for grading Wells Street in such manner as to accommodate the public, either above or below the established grade, so long as it keeps within the line of the street unless it thereby affects the value or usefulness of improvements which have been made with reference to said grade.

If the city had no right to make a dual grade and if plaintiff had a right to damages to some amount on a proper showing, yet the exclusion from the consideration of the jury of this dual grade was proper, for the reason that no competent evidence of this damage appeared in the case. His witnesses expressly placed their computation of damages on other grounds than the dual grade.

COLLINS, J. The defendant city had caused the grades of Greenbrier avenue and Wells street to be fixed in accordance with its charter provisions, long before the work was done of which the plaintiff complains. His lots were located upon a steep hill, and faced south upon Wells street, which ran east and west along the side of the hill, and below the lots. On the center line of this street the grade had been established, so that, generally speaking, it was just about at the natural surface of the ground, and, necessarily, the south half of the street would have to be filled when graded, while the north half, on which plaintiff's lots abutted, would have to be excavated. The city had the undoubted right to enter upon the avenue and street for the purpose of bringing to grade, improving, and making them passable.

In the control and improvement of its thoroughfares for public use the city has the same rights and powers as a private owner has over his own land, and is subject to the same liabilities. It would be liable for damages caused to plaintiff's property by grading the avenue and street, just as a private owner of the soil over which

they were laid would have been liable when improving it for his own use; and the right to inflict damage beyond that which a private owner might have inflicted without liability did not exist. The city was authorized to grade, but without exercising the right of eminent domain it was not authorized to encroach upon plaintiff's property when so doing. It could not excavate to the full width of the street, placing or leaving the slope thereof upon his lots, to their injury and impairment. As we understand the evidence, this is just what was done; and with respect to the plaintiff's right to recover for an interference with the soil of his lots the jurors were fully advised in the charge.

As to the grading done, the facts were that to its full width the avenue was placed on the established grade, while the north half of the street,—that half on which plaintiff's lots fronted,—as before stated, was brought to the same condition. It was excavated where it ran along the sidehill, and worked down to the established grade, and of this alone the plaintiff could not complain. The city was not obliged to grade the street to its full width, and, without incurring any liability to the plaintiff, could have left the south half in a state of nature, impassable for teams, and of no value as a highway.

We will now consider the plaintiff's right to recover compensation for damages other than those resulting from an encroachment for slopes upon the soil of his lots. The important question is whether, on the evidence, he was entitled to recover for alleged damages arising out of the fact that, when grading, the city authorities, without altering the theretofore established gradient lines,—as authorized to do by the charter on making compensation to injured property holders,—caused a separate and distinct roadway to be constructed on the south half of the street, and a retaining wall to be built along its center line. Opposite plaintiff's lots this roadway was about fifteen feet below that on the north half of the street, constructed on grade, as heretofore mentioned. It is obvious from the evidence that the work was done so as to amount to a permanent alteration of the established grade on the south half of the street, and for the purposes of this case it must be so treated. Because of the peculiar circumstances, the city authorities had power, when primarily fixing the grade lines of this street, to pro-

vide for two distinct and separate roadways, although the inevitable result would be to deprive abutting owners of some of the advantages and benefits of a full-width thoroughfare, *Yanish v. City of St. Paul*, 50 Minn. 518, (52 N. W. 925;) and it is apparent in this case that access to the plaintiff's lots from the street itself was not rendered more difficult, nor did greater consequential damages result thereto, by reason of change in the gradation on the south or opposite side of the street. Nor was plaintiff deprived of any light or air. With all these facts presented in connection with the power of the city authorities to practically narrow the street when first establishing the grade, as settled in the *Yanish Case*, it would be somewhat difficult to state the correct rule for the ascertainment of plaintiff's damages, even if we concede that he was entitled to recover because of the establishment of two distinct levels in the street.

Nor does the case, as now before us, require the correct rule to be stated, for it is evident that plaintiff failed to show what his damages were, even within the rule as to the proper measure therefor his counsel now asks to have applied. Assuming, as counsel now contends, that where an established grade has been altered so that there are two levels in a street instead of one, an abutting owner is entitled to recover as damages the amount his property has been depreciated in value by reason of the alteration, it is plain that plaintiff's proofs were not produced with reference to this measure of damages. On his part the cause was tried and submitted upon the theory that he was entitled to recover the full amount that his lots had been lessened in value by reason of all grading; not only that which was unauthorized, because it resulted in a permanent roadway on the south half of the street fifteen feet below an already established grade, but also the consequential damages resulting from the authorized and lawful grading on the north half,—that work which was done in strict conformity with gradient lines theretofore properly fixed. The plaintiff's damages were proved in a lump sum. All of his witnesses, when making their estimates, took into consideration what it would cost to make the lots available for building purposes, either by constructing retaining walls in front and on the sides, or by removing the soil so as to lower the surfaces. These were consequential damages,

the result of placing the north half of the street on a lawfully established grade, and in no manner affected by the duality of roadways. As before stated, these were damages for which the city was not liable.

Counsel for plaintiff has called our attention to certain parts of the cross-examination of the plaintiff and one of his witnesses as to the depreciation in value caused exclusively by the lower roadway. Even if the measure of damages is as claimed by counsel, we do not hesitate to say that these witnesses, when answering the questions as to values before the work was done and diminution in value as the result of that work, kept continually in mind the consequential damages to the lots; in other words, that plaintiff was entitled to have the street graded to its full width of sixty feet, without the slightest injury to his property.

As there was no evidence upon which the jury could have intelligently acted when attempting to assess the damages arising out of the practical alteration of the grade on the south half of the street, assuming that the plaintiff was entitled to recover therefor, the rulings of the trial court challenged by the assignments of error last referred to were correct.

Order affirmed.

(Opinion published 58 N. W. 601.)

Application for reargument denied April 17, 1894.

VILLAGE OF WYKOFF *vs.* JAMES HEALEY, Jr.

Submitted on briefs April 3, 1894. Affirmed April 14, 1894.

No. 8775.

Validity of independent part of a village ordinance.

The rule that one part of a statute or ordinance may stand though another part be invalid, applied.

James Healy, Jr. was convicted before the Village Justice of the Village of Wykoff, of being intoxicated on a public street of that village, contrary to an ordinance. He appealed on questions of

law alone to the District Court of Fillmore County, *John Whytock, J.*, where the conviction was affirmed. Upon Healy's request the Judge reported the case so far as was necessary to present the question involved and certified the report to this court under 1878, G. S. ch. 117, § 11. He claimed the ordinance under which he was convicted to be void because the penalty provided is in excess of the jurisdiction of a justice of the peace. The ordinance is as follows:

"Ordinance No. 3.

"The village council of the village of Wykoff do ordain:

"Section 1. Hereafter whoever shall be found drunk or in a state of intoxication on any street or sidewalk, or in any lane, alley, road, market or other public place within the corporate limits of the village of Wykoff, or any person or persons who shall be guilty of any riotous or obscene or disorderly conduct, or shall engage in any street brawl on any street or sidewalk, or in any lane, alley, road, market or other public place within the said corporate limits, shall be deemed guilty of a misdemeanor and on conviction thereof before the Village Justice shall pay a fine of not less than five nor more than twenty-five dollars and costs, and in default of payment of said fine and costs, he shall be committed to the jail of Fillmore county until such fine and costs are paid, and not exceeding ninety days.

"Sec. 2. Any person or persons who shall be convicted of any of the offenses enumerated in the foregoing section may in the discretion of the Village Justice be required to give good and sufficient bail with two or more sureties to be approved by said Justice, in the penal sum of not less than one nor more than five hundred dollars, conditioned that the person so convicted shall keep the peace and be of good behavior for the term of six months from the date of conviction, and in default of said bail he may be committed to the Fillmore county jail until such bail is given, not exceeding ninety days."

Burdett Thayer, for the accused.

The ordinance provides a penalty of both fine and imprisonment and thereby makes a case beyond the jurisdiction of a justice's court.

The penalty imposed by this ordinance is a fine of not less than

five dollars nor more than twenty-five dollars and costs, and in default of payment thereof commitment to jail not exceeding ninety days. The person convicted may in the discretion of the justice be also required to give a bond in the sum of \$500 with two sureties, and in default thereof he may be committed to jail for ninety days.

Violations of municipal ordinances punishable by fine or imprisonment are criminal offenses within the meaning of Article 1, Sec. 7, of the Constitution. Consequently where the punishment may exceed three months imprisonment or \$100 fine, (the limits of the jurisdiction of justices of the peace) a person can be tried only on the indictment or information of the grand jury. *State ex rel. v. West*, 42 Minn. 147; *State v. Yates*, 36 Neb. 287.

In the case at bar the penalty which the justice is authorized to impose upon conviction, is not a mere incident to the judgment or conviction, as in the case of *State v. Larson*, 40 Minn. 63, nor is it the revocation of some special privilege granted to the defendant and not enjoyed by all citizens as in *State v. Harris*, 50 Minn. 128.

Had the penalty prescribed in either Section 1 or Section 2 of the ordinance been the only penalty authorized by it, then the punishment would clearly be within the limit, but these two sections are enacted co-ordinately and the single judgment of the court may embrace both penalties.

Wells & Hopp, for the Village of Wykoff.

Section one of the ordinance is complete within itself and contains all the elements defining the crime and prescribing the penalty, so that if Section two be stricken from the ordinance, Section one under which Healy is convicted would be sustained. If part of a bylaw be void, another essential and connected part of the same bylaw is also void. But it must be essential and connected to have this effect. *Cooley*, Const. Lim. 176; 1 *Dillon*, Munic. Corp. § 354.

GILFILLAN, C. J. No question is made against the validity of section 1 of the ordinance, standing alone; the only claim of defendant being that section 2 makes the entire ordinance void. Conceding

(though we do not decide the point) that section 2, if it must be retained, would render void the otherwise valid part of the ordinance, the question is, can that section be rejected, leaving the unobjectionable parts of the ordinance to stand? That part of a statute may stand though some other part be void is well settled. The condition upon which the void part will carry down with it the parts otherwise unobjectionable is stated in Cooley, Const. Lim. page 178, thus: "If they are so mutually connected with and dependent on each other as conditions, considerations, or compensations for each other as to warrant the belief that the legislature intended them as a whole, and, if all could not be carried into effect, the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them."

Tested by this rule, section 1 would not fall though section 2 should go down. Section 1 does not depend in any way on section 2. The former is complete in itself. It defines the offense, and prescribes the punishment. The latter assumes to authorize the village justice, in his discretion, to also require of one convicted to give bail to keep the peace and for good behavior. There is no reason to believe the village council would not have defined the offense and prescribed the punishment just as in section 1, except on condition that the justice might, if he saw fit, also require bail; so that, if section 2 be invalid, its invalidity does not affect the other section.

And as the proceedings against defendant were only under the valid section, we need not consider whether anything against him could be done under the other.

Judgment affirmed.

BUCK, J., took no part in this decision.

(Opinion published 58 N. W. 685.)

v.57m.—2

57	18
60	267
57	18
81	322

CHARLES STEELE *et al.* vs. ANHEUSER-BUSCH BREWING ASS'N.

Argued April 11, 1894. Reversed April 14, 1894.

No. 8654.

Void lease regulates the rent if tenant enters and occupies.

Evans v. Winona Lumber Co., 80 Minn. 515, followed, to the effect that a lease void under the statute of frauds will nevertheless regulate the terms as to rent if the tenant goes into possession and occupies the premises.

Appeal by plaintiffs, Charles Steele, Jennie Abbott, Clara M. Slaymaker and Elizabeth M. Schwam, from a judgment of the District Court of Ramsey County, *John W. Willis, J.*, entered December 6, 1893, that they take nothing by the action.

On November 5, 1888, the defendant the Anhauser-Busch Brewing Association, a corporation, leased of plaintiffs for six and a half years the building Nos. 14, 16 and 18, East Seventh Street, St. Paul, and agreed to pay \$400 per month rent therefor on the first day of each month during the term. The lease was made on behalf of the plaintiffs by an agent who had no written authority to act for them. Jennie Abbott, Clara M. Slaymaker and Elizabeth M. Schwam were married women but the lease was not signed by any one of the husbands. The defendant entered and paid rent to June 1, 1893. This action was to recover \$1,200 rent for June, July and August, 1893. The defendant answered that the lease was void because plaintiffs' agent was not authorized in writing to execute it; 1878 G. S. ch. 41, § 12, as amended by Laws 1887, ch. 26; and because the term exceeded three years and the husbands of three of the lessors did not join in its execution; 1878 G. S. ch. 69, § 2; and alleged that the value of the use and occupation did not exceed \$200 per month. At the trial October 10, 1893, a jury was waived and the court held the lease wholly and utterly void and ordered judgment for defendant saying the action is based upon the express promise in the void lease and not upon a *quantum valebat*. Judgment was so entered and plaintiffs appeal.

Williams, Goodenow & Stanton, for appellants.

A lease of property by one tenant in common is valid unless avoided by the other cotenants. *Sherin v. Larson*, 28 Minn. 523; *Hennessy v. St. Paul M. & M. Ry. Co.*, 30 Minn. 55; *Austin v. Ahearne*, 61 N. Y. 6; *Brown v. Wellington*, 106 Mass. 318.

This lease was valid as to Charles Steele because signed by his agent in his presence and by his request. *Gardner v. Gardner*, 5 Cush. 482; *Burns v. Lynde*, 6 Allen, 305; *Hunter v. Giddings*, 97 Mass. 41; *Bartlett v. Tucker*, 104 Mass. 336.

Defendant having entered into possession under the lease is bound to pay the stipulated rent, so long as it remains in possession even though the lease be void. *Dean v. Leonard*, 9 Minn. 190; *Hewitt v. Brown*, 21 Minn. 163; *Evans v. Winona Lumber Co.*, 30 Minn. 515.

The complaint is for rent and the point is made that it should have been *quantum valebat*, but as the lease fixes the amount of rent this is not correct. *Wood, Landl. & T.* § 28; *Laughran v. Smith*, 75 N. Y. 205.

Briggs & Countryman, for respondent.

One tenant in common cannot bind the others by a lease of the whole premises. Such a lease executed by one tenant in common is not valid as to the others unless it be ratified. It gives the lessee the right to use the premises only as the lessor might use them, subject to the rights of the other tenants in common. *Taintor v. Cole*, 120 Mass. 162; *Rising v. Stannard*, 17 Mass. 282; *Mursy v. Holt*, 24 N. H. 248; *Tipping v. Robbins*, 64 Wis. 546.

The lease is void as to all parties for it is a lease of real property for six years and six months executed by an agent having no written authority, and three of the lessors were married women. *Haupt Lumber Co. v. Westman*, 49 Minn. 397; *Gregg v. Owens*, 37 Minn. 61; *Yager v. Merkle*, 26 Minn. 429; *Althen v. Tarbox*, 48 Minn. 18; *Nell v. Dayton*, 43 Minn. 242.

In *Evans v. Winona Lumber Co.*, 30 Minn. 515, the plaintiff sought to recover the rent due for one year's actual occupation. He did not pretend that the lease was valid. He admitted its invalidity

but sought to use it as a means by which to determine the amount defendant should pay by such occupation. The case decides that the lease will control and govern the amount to be paid. The question of the form of pleading was not raised. *Sanford v. Johnson*, 24 Minn. 172, was then as it is now, the law of this state upon the question whether an action can be maintained upon a void lease to recover rent provided for in it.

GILFILLAN, C. J. The plaintiffs, tenants in common of real estate in St. Paul, attempted to rent the same by written lease to defendant for the term of seven years at stipulated rents per annum, payable monthly. The lease was void as to some of the parties under the statute of frauds, 1878 G. S. ch. 41, §§ 10, 12, because the agent by whom it was signed in their behalf was not authorized in writing; and also under 1878 G. S. ch. 69, § 2, because, they being married women, their husbands did not join with them in the lease. The defendant, however, entered upon and continued in possession. The action is to recover the rents stipulated in the void lease during part of the time of such possession.

By entering on and occupying the premises the defendant became tenant of the plaintiffs, and, as held in *Evans v. Winona Lumber Co.*, 30 Minn. 515, (16 N. W. 404,) the writing, though void as a lease, regulated the terms of the tenancy as respects the rent.

The complaint was probably framed as in an action on the lease, but it also alleges the occupancy during the period for which a recovery is sought; so that the facts of occupancy, and that the rent was fixed by the writing, are within the allegations of the complaint. So far as this action is concerned, it is immaterial that the allegation of a lease for seven years was not proved.

The judgment is reversed, and the court below will enter judgment on the findings of fact in favor of plaintiffs for the relief demanded in the complaint.

BUCK and CANTY, JJ., took no part in this decision.

(Opinion published 58 N. W. 685.)

In re MICHAEL GLYNN'S ESTATE.

Submitted on briefs April 9, 1894. Affirmed April 14, 1894.

No. 8696.

Expenses in the administration of a decedent's estate.

The expenses of one in looking out for his own interest in a decedent's estate cannot be allowed as an expense of its administration.

Expenses of hunting for next of kin, not allowed.

Nor can there be so allowed the expenses of one of the heirs or next of kin, incurred after an administrator appointed, in hunting up other heirs or next of kin.

Appeal by Hazen M. Parker, administrator of the estate of Michael Glynn, deceased, from a judgment of the District Court of Hennepin County, *Charles M. Pond, J.*, entered November 14, 1893, disallowing his claim for the expenses of his agent Peter Glynn in looking after the property of the estate and hunting up the next of kin.

Michael Glynn died intestate March 8, 1890, in Hennepin County leaving a brother Peter Glynn, a sister Mary Salmon, and two nephews Henry Anderson and John J. Anderson, children of Catharine, a deceased sister, his next of kin and sole heirs at law. He left estate appraised at \$1,973.26. On June 3, 1890, Hazen M. Parker was appointed administrator of the estate. He performed the duties of the office and on June 28, 1892, presented his final account for settlement. He included therein \$160 paid to Peter Glynn for his expenses in coming from his home in Carteret, New Jersey, to Minneapolis in April, 1890, and remaining until the administrator was appointed. His account also included \$180 paid Peter Glynn for expenses on a trip to Ireland to hunt up Mary Salmon and the two Anderson children. She and they appeared by attorney and opposed these two items. The Probate Court allowed \$300 thereof. Mrs. Salmon and the Andersons appealed therefrom to the District Court where both items were disallowed. The administrator thereupon appealed to this court.

Hazen M. Parker, pro se, cited *Mann v. Lawrence*, 3 Bradf. 424; *Mett's Appeal*, 1 Whart. 7; *Wall's Appeal*, 38 Pa. St. 464; *Barney v. Saunders*, 16 How. 535; *Mason v. Roosevelt*, 5 John. Ch. 533.

C. L. Lamb, for the next of kin.

GILFILLAN, C. J. Michael Glynn died in Hennepin county, in this state. His brother Peter Glynn, living in New Jersey, hearing of the death, came to Minneapolis to look after the estate, and remained about two months, till an administrator was appointed. He paid out for railroad fares, board, and other expenses about \$160. Afterwards, by the advice of the administrator, he went to Ireland to ascertain the whereabouts of other heirs or next of kin, and was gone about two months, expending in traveling and other expenses about \$180. And he also claims his time was worth \$50 per month. The court below finds that he rendered the services on his own account, and the estate was in no way benefited by them.

The question is, were these items proper charges by the administrator as expenses of administration? We fail to see that they had anything to do with the administration. His coming to Minneapolis was not only before there was any administrator, but was clearly in his own interest, to get what there might be for him in the estate. His going to Ireland might be a benefit to the heirs or next of kin found by him, as it might enable them to get their share of the estate. If so, he must settle with them. If such items are to be allowed as expenses of administration, they must be paid before any one else, even creditors, can be paid. If one coming from a distance to look out for his own interest in the estate of one dying here may be allowed his expenses, and especially if he may make himself a roving commissioner to hunt up others interested with him, and the cost of the hunt is to be allowed as expenses of administration, it will furnish a convenient and simple mode of using up moderate estates.

Such claims cannot be allowed.

Judgment affirmed.

BUCK and CANTY, JJ., took no part in this decision.

(Opinion published 58 N. W. 684.)

PHILLIP DRESSEL vs. PETER SHIPMAN.

Submitted on briefs April 8, 1894. Affirmed April 14, 1894.

No. 8708.

57	23
64	281
57	23
65	87

57	33
74	88

57	23
85	212

A newspaper article held libelous.A certain published article *held* libelous *per se*.**Proof of provocation to mitigate damages.**

In an action for libel, the defendant cannot prove a previously published article libeling him, without evidence that plaintiff caused, or had some part in causing, its preparation or publication.

Appeal by defendant, Peter Shipman, from an order of the District Court of LeSueur County, *Francis Cadwell, J.*, made December 26, 1893, denying his motion for a new trial.

On October 14, 1892, the defendant composed and published in the Montgomery Messenger, a letter saying among other things that an article in the Waterville Advance was evidently written by a former county official, that such as he, would in public office plunder the people and in business swindle their creditors, that they would burn their old log houses and gull the insurance companies out of enough to build palatial mansions. The plaintiff, Phillip Dressel, had been county auditor and his house had been burned and he had collected the insurance. He claimed that defendant's letter was intended, and was understood, to refer to him and he brought this action to recover damages for the libel.

Defendant answered denying that plaintiff was the person intended or referred to in the letter. He alleged in mitigation that he wrote and published the letter in response to a defamatory and scurrilous article in the Waterville Advance referring to and concerning defendant. On the trial the jury returned a verdict for plaintiff and assessed his damages at \$370. Defendant moved for a new trial and being denied appeals.

W. H. Leeman, for appellant.

There is no allegation in the complaint of any special damages. The publication is not actionable *per se*. It is not alleged that plaintiff held any office at the time, or that he was engaged in

any business. *Weil v. Altenhofen*, 26 Wis. 708; *Schmidt v. Witherick*, 29 Minn. 156.

Nor does it charge the plaintiff with the commission of a public offense for which he could be prosecuted. The only part of the letter that can be claimed to be libellous on its face is the following; "They will burn their old log houses and gull the insurance companies out of enough to build palatial mansions." The verb is used in the future tense. It does not charge any overt act; the defendant could not plead the truth in justification of such a charge. *Bays v. Hand*, 60 Ia. 251; *Carlson v. Minnesota Tribune Co.*, 47 Minn. 337; *Van Vechten v. Hopkins*, 5 Johns. 211; *Purdy v. Rochester Printing Co.*, 96 N. Y. 372.

Thomas Hessian, for respondent.

The letter is libelous on its face and clearly so in connection with the averments and matters of inducement alleged and set out in the complaint. It was well calculated to subject the plaintiff to scandal and suspicion and expose him to contempt and hatred. *Powers v. Du Bois*, 17 Wend. 63; *More v. Bennett*, 48 N. Y. 472; *Petsch v. Dispatch Printing Co.*, 40 Minn. 291. No allegation of special damages was necessary. The defendant disregards the distinction between cases of slander and libel. The cases cited are all cases of slander. *Holston v. Boyle*, 46 Minn. 432; *Pollard v. Lyon*, 91 U. S. 225; *Sanderson v. Caldwell*, 45 N. Y. 398.

There was no error in excluding the article published in the Waterville Advance. There was no testimony in the case showing or tending to show that the plaintiff had anything to do or any connection with the publication of that article. On the contrary it appears that he first heard of its publication after the publication of the letter complained of in this action. It was not admissible in mitigation or for any other purpose. *Quinby v. Minnesota Tribune Co.*, 38 Minn. 528.

GILFILLAN, C. J. A publication calculated to expose one to public hatred, contempt, or ridicule being libelous *per se*, the article for publishing which this action was brought is a libel, not only taken as a whole, but in every paragraph of it, whomsoever

was intended and understood by others to be intended as the object of it; and if it was intended to apply to plaintiff, and was so understood by others, his right of action upon it was complete. He was not named in it, nor is that necessary where the libelous article contains reference to matters of description or to facts and circumstances from which others reading the article may know the plaintiff was intended. The evidence of the circumstances of plaintiff was such, in connection with those referred to in the article, as to make it a question for the jury whether the plaintiff was intended and understood by others to be intended by it.

The article previously published in another newspaper, reflecting on defendant, could be admitted only in mitigation of damages, because furnishing a provocation, upon evidence that plaintiff caused, or had some part in causing, its preparation or publication; and there was no such evidence. The fact that some one had libeled the defendant was no excuse for his libel upon plaintiff.

No other point is raised deserving of particular mention. The appeal is utterly without merit.

Order affirmed.

BUCK, J., took no part in this decision.

(Opinion published 58 N. W. 684.)

JOSEPH HOFFMAN vs. WILLIAM MEYER.

Submitted on briefs April 9, 1894. Affirmed April 14, 1894.

No. 8504.

Review of order granting or refusing a new trial.

Rule in *Hicks v. Stone*, 13 Minn. 434 (Gil. 898), followed.

Appeal by defendant, William Meyer, from an order of the District Court of Jackson County, *P. E. Brown, J.*, made February 8, 1893, granting the motion of plaintiff, Joseph Hoffman, for a new trial.

This action was to recover damages for an assault and battery. The answer was, *son assault demesne*. The parties were German

farmers who had quarrelled over the location of a corner stake between their lands. The evidence was conflicting. The jury returned a verdict for defendant, and the court on motion set it aside and granted a new trial. Defendant appeals.

Thomas J. Knox, for appellant.

W. A. Funk, for respondent.

GILFILLAN, C. J. The evidence in this case was not manifestly in favor of the verdict, so that the case comes within the rule in *Hicks v. Stone*, 13 Minn. 434 (Gil. 398), so often followed by the court.

Order affirmed.

BUCK, J., took no part in this decision.

(Opinion published 58 N. W. 684.)

ERIC ERICSON *vs.* DULUTH & IRON RANGE R. Co.

Submitted on briefs April 3, 1894. Affirmed April 14, 1894.

No. 3677.

Allowing domestic animals to run at large is not necessarily contributory negligence.

Where domestic animals are injured by reason of a railway company failing to perform its statutory duty to fence its road, the bare fact that their owner voluntarily permitted them to run at large, contrary to law, does not, as between him and the railway company, necessarily constitute contributory negligence *per se*; following former decisions.

It is a question of fact for the jury.

Whether the plaintiff was guilty of contributory negligence in permitting his animals to run at large, *held*, under the facts of this case, to have been a question for the jury.

Appeal by defendant, the Duluth and Iron Range Railroad Company, from an order of the Municipal Court of the City of Duluth, *Roger S. Powell, J.*, made October 27, 1893, denying its motion for a new trial.

The plaintiff, Eric Ericson, resided at Biwabik, a station on defendant's railroad. The country was new and the railroad unfenced. He permitted his cow to run at large during the day time and graze on the commons and in the village streets. On July 8, 1893, she went upon the railroad track at a place two miles west of the station and was struck by one of defendant's trains and killed. He brought this action to recover damages, claiming the statutory presumption of negligence on the part of defendant because of its failure to fence its tracks. 1878 G. S. ch. 34, §§ 54, 55. Defendant answered that plaintiff was guilty of contributory negligence in allowing his cow to run at large, knowing the track to be unfenced. This was defendant's contention at the trial and it was submitted to the jury. Defendant excepted. The jury found for the plaintiff and assessed his damages at \$50. Defendant moved for a new trial but was denied and it appeals.

Draper, Davis & Hollister, for appellant.

Plaintiff allowed his cow to go at large contrary to law. In consequence of this neglect of duty she went upon the track and was killed. She was there by his fault. He was guilty of contributory negligence. *Locke v. First Div. St. Paul & P. R. Co.*, 15 Minn. 350; *Wetherell v. Milwaukee & St. P. Ry. Co.*, 24 Minn. 410; *Palmer v. Northern Pac. R. Co.*, 37 Minn. 223; *Moser v. St. Paul & D. R. Co.*, 42 Minn. 480; *Johnson v. Chicago, M. & St. P. Ry. Co.*, 29 Minn. 425; *Watier v. Chicago, St. P. & O. Ry. Co.*, 31 Minn. 91.

Austin N. McGindley, for respondent.

The bare fact that the cow was unlawfully running at large did not constitute her owner a wrongdoer as to defendant, nor was it contributory negligence *per se* on his part. It was a question of mixed law and fact and was for the jury. This was so held in *Green v. St. Paul, M. & M. Ry. Co.*, 55 Minn. 192. The case of *Moser v. St. Paul & D. R. Co.*, 42 Minn. 480, was mentioned in that case but was not followed.

MITCHELL, J. It is the settled doctrine of this court that, while the statutory liability of railway companies for domestic animals killed or injured by reason of their failure to fence their roads is

subject to the general rule that a person cannot recover whose negligence has proximately contributed to the injury complained of, yet the mere fact of voluntarily permitting animals to unlawfully run at large does not, as between the owner and the railway company, amount, *per se*, to contributory negligence. *Johnson v. Chicago, M. & St. P. Ry. Co.*, 29 Minn. 425, (13 N. W. 673;) *Watier v. Chicago, St. P., M. & O. Ry. Co.*, 31 Minn. 91, (16 N. W. 537;) *Green v. St. Paul, M. & M. Ry. Co.*, 55 Minn. 192, (56 N. W. 752.) It was said in *Watier v. Chicago, St. P., M. & O. Ry. Co.*, *supra*, that, in such cases, to establish contributory negligence there must be some act or omission of the plaintiff proximately affecting the question of the exposure of the animal to danger, or contributing to the accident.

To charge the owner with contributory negligence it must appear that he allowed his stock to run at large under such circumstances that the natural and probable consequence of so doing was that the stock would go upon the railroad track and be injured; that the risk of danger was such that a person in the exercise of ordinary prudence and reasonable care would not have allowed the animals to run at large. Ordinarily, this would be a question of fact for the jury.

There might be cases where the character of the animals was such, and the danger so imminent, that the court would be justified in holding, as a matter of law, that the owner was guilty of contributory negligence in permitting them to run at large. Such seems to have been the view taken of the facts in *Moser v. St. Paul & Duluth R. Co.*, 42 Minn. 480, (44 N. W. 530,) which can only on that ground be reconciled with our former decisions. Biwabik appears to be a new and small hamlet in the woods on the line of defendant's road; the surrounding country being, as we infer, mainly unimproved and uninclosed.

Whether the plaintiff was, as to the defendant, guilty of contributory negligence in allowing, as others did, his cow to run at large during the daytime, for purposes of pasturage, on the uninclosed land in the vicinity of the village, notwithstanding that he knew that defendant's track in that neighborhood was not fenced, was, in our judgment, a question of fact for the jury.

The court instructed the jury, in general terms, that the plaintiff could not recover if his negligent acts or omissions contributed to the injury so that, but for such negligence, the cow would not have been killed.

The defendant requested the court to further instruct the jury that if they found "that plaintiff lived within sight of defendant's tracks, and kept his cow there, and knew that defendant's tracks were not fenced, and that, if allowed to run at large, there was danger that his cow would get on the track and get killed, yet turned his cow out to run at large, he was guilty of contributory negligence, and could not recover."

Of course, when an animal is allowed to run at large, and there is an unfenced railroad anywhere within a distance to which the animal may roam, there is always some chance that the animal may get upon the track and be injured. The effect of the instruction asked for would be to hold that in every such case, regardless of other circumstances, the bare fact of allowing the animal to run at large would constitute contributory negligence. The request went too far, and, if granted, would have practically taken the case from the jury. It was virtually equivalent to a request to direct a verdict for defendant.

The charge of the court as to the effect of contributory negligence on part of the plaintiff was so very general as to furnish little or no aid to the jury, and, if asked for in proper form, the defendant would have been entitled to some more specific instructions on the subject; but the instruction requested was properly refused.

Order affirmed.

(Opinion published 58 N. W. 822.)

ROBERT LUECK vs. ST. PAUL & DULUTH RAILROAD CO.

Submitted on briefs April 9, 1894. Affirmed April 14, 1894.

No. 871L.

Change of venue in justice's courts.

The provision that no justice is required to transfer a civil action "until all his costs are paid," 1878 G. S. ch. 65, § 20, is inapplicable to a change of venue from one municipal court to another. Laws 1893, ch. 51, where the judge of such court is a salaried officer, and has no personal interest in the costs of the suit.

"Before trial commenced" defined.

An action being at issue and called for trial, a jury was demanded and granted, and the cause continued to a future day, at which the venire for the jury was returnable. *Held*, that an application for a change of venue on the latter day was not made "before the trial commenced," within the meaning of the statute.

Appeal by defendant, the St. Paul and Duluth Railroad Company from a judgment of the Municipal Court of the Village of West Duluth, *T. C. Himebaugh, J.*, entered March 11, 1893, against it for \$333.74.

Twelve laborers worked for defendant during the season of navigation in 1892, in handling merchandise on its dock and in its flourshed in Duluth. They claimed that it was orally agreed in the spring of that year between defendant and each of them that he should be paid \$1.75 per day and in case he remained in its service until navigation closed the further sum of twenty cents per day for each day of his service. The defendant paid the wages at \$1.75 per day and denied that it agreed to pay more. The laborers assigned their claims to the plaintiff, Robert Lueck, and he brought this action to recover the additional twenty cents per day. Issue was joined December 16, 1892. At the first trial on December 23, 1892, the jury disagreed and were discharged. The case was set for another trial on February 16, 1893, and a venire issued and a jury summoned. But the trial was again postponed to February 20, when for the first time defendant moved for a change of venue. The motion was denied, the cause tried and a verdict rendered for plaintiff for \$257.55. Judgment was entered thereon and defendant appeals.

Bunn & Hadley and J. D. Armstrong, for appellant.

John Jenswold, Jr., for respondent.

MITCHELL, J. Laws 1893, ch. 51, provides that where, in any county, there are two or more municipal courts, the defendant in a civil action may have a change of venue from one to another, under the same circumstances and upon the same conditions as are now provided for changing the venue in justice's courts.

The statute regulating changes of venue in justice's court, 1878 G. S. ch. 65, § 20, provides that the application must be made "before the trial commences;" also that no justice is required to transfer a civil action "until all his costs in the same are paid." We agree with defendant that this last provision is inapplicable to changes of venue from one municipal court to another in Duluth.

A justice of the peace is not a salaried officer, his compensation being his costs in the suit. This provision was designed to secure him this compensation, and applies only to the personal fees of the justice. A municipal judge in Duluth is a salaried officer, and he has no interest in the costs of the suit. There are no costs which belong to him.

But the application for a change of venue was properly denied, because not seasonably made. Except by recital in the judgment (which would be insufficient), it does not appear from the original return when, if ever, the application was presented to the judge, or, if presented, how disposed of. But in the amended return it appears that the case came on for trial December 23d; that a trial was had with a jury, which resulted in their disagreement and discharge; that, on February 14th following, the case was set for trial on February 16th, and a jury summoned, which was for some reason, not stated, discharged without any trial being had, and the case continued until February 20th, a jury of twelve being asked for and granted; that, pursuant to adjournment, the case was called February 20th, when for the first time the motion for a change of venue was made.

In view of the general rule, independent of statute, founded on considerations of public policy, that motions for change of venue should be made at the earliest practicable moment, a strong argument could be made in favor of the position that the phrase, "be-

fore the trial commences," should be construed as meaning "before any trial has been commenced," and that such an application comes too late after a trial, although it may have resulted in a disagreement of the jury, or in a verdict which was afterwards set aside. See *Smith v. Castles*, 1 Gray, 108. Such seems to have been the construction placed in many of the best-considered cases upon the Federal removal acts, which required the right of removal to be exercised "before trial or final hearing." *Galpin v. Critchlaw*, 112 Mass. 339; *Home Life Ins. Co. v. Dunn*, 20 Ohio St. 175; *Chandler v. Coe*, 56 N. H. 184. The argument used in those cases generally is that the statute could not have contemplated that a party, after experimenting with a trial on the merits before one court, should be allowed to transfer it to another. But it is not necessary, for the purposes of this case, to go so far as this. Leaving out of view all that preceded, it appears from the record that on February 16th, when the case was called for trial, a jury was demanded and granted, and the cause continued until February 20th, at which date, we assume, the venire for the jury was returnable; and it was not until after the case had been called for trial on the latter day, and presumably after the jurors had been summoned and had appeared in court, that the application for a change of venue was made. We are of opinion that upon this state of facts the application was not made before the trial commenced, within the meaning of the statute, although the jurors may not have been as yet sworn, or any evidence introduced.

We think that, for the purposes of such a motion, the trial must be deemed to have been commenced at least on February 16th, when a jury was demanded and granted, and a venire therefor presumably issued. The unreasonableness of allowing such an application after this is all the more apparent from the fact that, for anything that appears, the demand for a jury may have been made by the defendant itself.

Judgment affirmed.

(Opinion published 58 N. W. 821.)

CLARA McMULLEN vs. PEOPLE'S SAVINGS & LOAN ASS'N.

Argued April 12, 1894. Affirmed April 14, 1894.

No. 8781.

Contract by correspondence construed.

Held, construing the correspondence between the parties, that in receiving from defendant money due plaintiff, and remitting her a draft for the amount, a certain bank was the agent of defendant.

Appeal by defendant, People's Savings and Loan Association of Minneapolis, from an order of the District Court of Hennepin County, *Henry G. Hicks, J.*, made January 6, 1894, denying its motion for a new trial. The case is stated in the opinion of the court.

F. B. Hart, for appellant, cited *First Nat. Bank v. Free*, 67 Ia. 11; *St. Paul Nat. Bank v. Cannon*, 46 Minn. 95; *Lowery v. Western Union Tel. Co.*, 60 N. Y. 198; *Jung v. Second Ward Sav. Bank*, 55 Wis. 364.

Wilson & Van Derlip, for respondent.

MITCHELL, J. Plaintiff was the owner of three shares of stock in the defendant corporation, which she had a right, under its charter and by-laws, to retire at their then cash value by giving sixty days' notice of such intention. The plaintiff resided in Rochester, N. Y., and the defendant's place of business was in Minneapolis. On February 17th the plaintiff had given defendant notice of her intention to exercise this right to retire her stock. On April 21st, on the expiration of the sixty days, defendant wrote to plaintiff as follows:

"I herewith inclose three vouchers for you to execute. Please date and sign the same. * * * Also assign your certificates of stock on the back to the People's Savings & Loan Association, and return both certificates and vouchers to the Farmers' & Merchants' State Bank of this city, when the amount due you will be promptly paid."

On the receipt of this letter, the plaintiff executed the papers
v.57m.—3

as directed, and sent them in a letter, addressed to this bank, saying:

"I this day mail you three vouchers for withdrawal of stock now with the People's Savings & Loan Association; also certificates of the same, which I am authorized by them to deliver to you. Will you please cash their value, and send same to me at your earliest convenience, and retain four dollars to be paid the said association for withdrawal fee."

The bank, on receipt of the papers, presented and surrendered them to the defendant, and received from it the surrender value of the stock in money. Two days afterwards the bank remitted by mail to plaintiff at Rochester its draft on New York for the amount. Plaintiff received this draft by due course of mail, and deposited it with her home bank for collection, but before it was presented for payment the Farmers' & Merchants' State Bank failed, and consequently the draft was dishonored.

The plaintiff brings this action to recover the surrender value of her stock, claiming that the bank was acting as defendant's agent; while, on the other hand, the defendant's contention is that in receiving and transmitting the money the bank was plaintiff's agent. The case turns entirely upon this question.

While it is true that the money was payable at defendant's office on presentation and surrender of the necessary vouchers, and that defendant was not bound to do anything until a demand was made at that place, yet it was competent for the defendant to waive this, and to propose a different method and place of payment; and while defendant, in doing what it did, might have been actuated by considerations of convenience to the plaintiff, yet we think the fair import of its letter to plaintiff was that, if she would send the papers to the bank, defendant would pay the money to her. It is probably fairly inferable that it contemplated making this payment through the medium of the bank (and this is as the plaintiff evidently understood it), but in doing so the bank would be the agent of the defendant. There is nothing in plaintiff's letter to the bank inconsistent with this idea, or indicating any intention on her part to appoint it her agent for the purpose of collecting or transmitting her money. All there is to it is that plaintiff, as

suming that the defendant proposed to use the bank as its medium for the payment of the money, requested it to transmit it at its earliest convenience.

Order affirmed.

BUCK, J., absent, took no part.

(Opinion published 58 N. W. 820.)

MINNEAPOLIS THRESHING MACH. CO. *vs.* FIREMEN'S INS. CO. OF CHICAGO.

Argued April 5, 1894. Affirmed April 14, 1894.

No. 8474.

"While not in use" in a fire insurance policy construed.

The defendant insured against loss by fire a threshing machine engine and separator "while not in use." The property, which had not been used for threshing for some two weeks, was hauled out into the country, and left standing near a farm house, preparatory to its intended use a few days later, and, while standing there, the separator was destroyed by fire. The fire was not caused by any hazard incident to the actual use or operation of either the engine or separator. *Held*, that the property was not "in use" within the meaning of the policy.

Appeal by defendant, the Fireman's Insurance Company of Chicago, Ill., from an order of the District Court of Hennepin County, *Henry G. Hicks, J.*, made July 3, 1893, denying its motion for a new trial.

C. M. Hertig and *R. A. Daly*, for appellant.

James O. Pierce, for respondent.

MITCHELL, J. On October 8, 1891, the defendant issued to one Foss its policy of insurance for one year against loss by fire on his threshing machine engine and separator "while not in use;" loss, if any, payable to the plaintiff, as its interest might appear. The separator was destroyed by fire on October 1, 1892, and really the only question in the case is whether the property was "in use," within the meaning of the policy, at the time of the loss.

The engine and separator had been used in threshing in the early

part of September, 1892, but had not been so used for two weeks prior to the date of the fire, having been taken and kept during that time in the village of Madelia, for the purposes of repairs. On October 1, 1892, the engine was fired up, and used as a traction engine in hauling the separator seven miles out in the country, preparatory to the intended use, two days later, of both engine and separator in threshing. The property was left standing about ten rods from a farm house and some fifteen rods from the stacks of grain which it was intended to thresh. The fire in the engine was extinguished. During the succeeding night, while the property was standing there, the separator was destroyed by fire. The origin of the fire is unknown, but it is supposed to have been incendiary.

It is evident that the fire was not occasioned by any use of either the separator or the engine, and was not due to any risk incident to their actual use in the operation of threshing or otherwise. The most obvious and natural meaning of the words "in use," as applied to this property, is use in the business or work for which it was designed, to wit, threshing; and evidently the object of the limitation of the risk contained in the policy was to exclude any possible liability on part of the insurer for losses by fire so peculiarly liable to occur during the actual operation of steam threshing machines.

We do not think that the separator was "in use," within the terms of the policy, when the loss occurred. The most that can be claimed is, that the expression is ambiguous, and in such case the rule is well settled that such ambiguity must be construed against the insurer, and favorably to the insured. If the defendant desired to limit the risk to the property while "in store," or to exclude from the risk all losses during "the threshing season," it would have been very easy to have said so in plain and unmistakable language.

There was a provision in the policy that it should be void "if the hazard be increased by any means within the control or knowledge of the insured," and it is claimed that under this provision the policy was entirely avoided by reason of the use of the property for threshing in the month of September. There is no merit whatever in this point.

To say nothing of the fact that no such defense was pleaded, this provision is not to be construed so broadly as to include hazards incident to a reasonable use of the insured property, having regard to its nature and circumstances. The insurance, unless the terms of the policy forbid, must be presumed to be made with reference to the character of the property insured and to the owner's use of it in the ordinary way. While it is true that the risk only covered the property while not in use, yet the policy nowhere forbade its use, or provided that the policy should become entirely void if it was used.

Order affirmed.

(Opinion published 58 N. W. 819.)

L. KIMBALL PRINTING CO. *vs.* SOUTHERN LAND IMPROVEMENT CO. *et al.*

Argued April 10, 1894. Modified April 20, 1894.

No. 8801.

Appeal bond construed.

Extra-statutory language found in a bond on appeal from an order denying a new trial, conditioned as required by 1878 G. S. ch. 86, § 10, construed. *Held*, the appeal in question having been dismissed on motion of plaintiff respondent because of appellant's failure to comply with Supreme Court rule XI, that, in an action on the bond, plaintiff, by virtue of the extra condition alone, was not entitled to recover the amount of the judgment entered in the court below subsequent to the dismissal.

Costs on a recovery of less than \$100.

Greenman v. Smith, 20 Minn. 418, and *Potter v. Mollen*, 86 Minn. 122, followed as to the allowance of statutory costs in an action brought in District Court, and of which a justice of the peace has no jurisdiction where the damages recovered are less than \$100.

CANTY, J., dissents on the last proposition.

Appeal by plaintiff, the L. Kimball Printing Company, from a judgment of the District Court of Hennepin County, *Henry G. Hicks, J.*, entered October 16, 1893.

This action was commenced in the District Court against the Southern Land Improvement Company, principal, and F. Fremont

Reed and Jesse B. Butin, sureties, upon a bond made by them to plaintiff March 8, 1892, for \$550 conditioned that if the Southern Land Improvement Company, a Kentucky corporation, should pay the costs of an appeal from the Municipal Court of the City of Minneapolis and the damages sustained by the L. Kimball Printing Company in consequence of the appeal, if the order appealed from should be affirmed or the appeal dismissed, and should abide by and satisfy the judgment or order which the appellate court might give therein and should pay the amount which might finally be recovered in the Municipal Court against the Southern Land Improvement Company after decision of the appeal, then the bond should be void, otherwise of force.

The bond was made under these circumstances. The L. Kimball Printing Company had obtained a decision February 15, 1892, granting it judgment in the Municipal Court against the Southern Land Improvement Company for \$439.30 and interest. The Improvement Company had moved in that court for a new trial of that action, but had been denied and it was about to appeal therefrom to this court. To make the appeal and obtain a stay it executed this bond with sureties.

This court on October 5, 1892, dismissed that appeal because the appellant failed to print and serve copies of the return to this court as required by its rules. Judgment was entered in this court against the appellant for \$19.25 costs. A mandate and transcript were sent down to the Municipal Court and on October 25, 1892, judgment was there entered upon the findings against the Southern Land Improvement Company for \$494.05 including interest and costs. Execution was issued and was returned by the sheriff unsatisfied. Soon after the L. Kimball Printing Company brought this action on the appeal bond to recover of the sureties the amount of both judgments. The defendant Butin answered and the District Court made findings and ordered judgment for plaintiff for the \$19.25 and interest, but refused judgment for the \$494.05. The clerk taxed plaintiff's costs and disbursements on notice at \$37.90. This included \$10 statutory costs, but on defendants' application the District Court struck out this item of \$10 and plaintiff obtained judgment for only \$20.46 damages and \$27.90 disbursements. Be-

ing dissatisfied the plaintiff appeals, and claims its judgment should have been for \$513.30 and interest and for \$37.90 costs and disbursements.

Everett Moon, for appellant.

The plaintiff was entitled to judgment for the \$494.05 as well as for the \$19.25, both were embraced in the terms of the appeal bond. *Clark v. Thorp*, 2 Bosw. 680; *Post v. Doremus*, 60 N. Y. 371; *Heebner v. Townsend*, 8 Abb. Pr. 234; *Oxford v. Paris*, 33 Me. 179; *Wenham v. Essex*, 103 Mass. 117; *Bell v. Bruen*, 1 How. 169; *Estey v. Skeckler*, 36 Wis. 434; *Merrill v. Dearing*, 24 Minn. 179; *Bank v. Willard*, 10 N. H. 210; *Ryan v. Webb*, 39 Hun, 435.

This action was brought for \$513.30 damages and was one of which a justice of the peace had no jurisdiction and plaintiff was entitled to the \$10 costs. *Greenman v. Smith*, 20 Minn. 418; *Potter v. Mellen*, 36 Minn. 122.

F. B. Hart, for respondent.

Plaintiff insists that the order of dismissal made upon its motion for failure of defendant to serve printed copies of the return was and constituted a decision of that case. From this view we dissent. Upon an appeal to this court it may reverse, affirm or modify the judgment or order appealed from. It has no statutory powers of dismissal whatsoever, except upon appellant's failure to furnish the court with copies of the notice of appeal and of the order or judgment roll. 1878 G. S. ch. 86, § 7. Such dismissal of the cause is not an adjudication of the questions involved. Upon dismissal being made another appeal can be at once taken. 1878 G. S. ch. 86, § 20. *Merrill v. Dearing*, 24 Minn. 179; *Schleuder v. Corey*, 30 Minn. 501.

The action of the District Court in disallowing the item of \$10 costs was correct. 1878 G. S. ch. 67, § 2, provides that to entitle the plaintiff to statutory costs he must have obtained or be entitled to a judgment in his favor of \$100 or more. *Greenman v. Smith*, 20 Minn. 418, is not in point. No objection was made in that case to taxation in the court below.

COLLINS, J. The bond to be construed in this action was conditioned as required by 1878 G. S. ch. 86, § 10. and to the prescribed statutory conditions there was added the following: "And pay the amount, if any, which shall be finally recovered in said Municipal Court against defendant after decision of said Supreme Court." The appeal from an order denying defendants' motion for a new trial, referred to in the bond, was dismissed on motion of respondent plaintiff, for failure of appellant to serve his paper book and points and authorities. Rules XI and XIV of this court. The cause having been remitted, judgment was entered in the Municipal Court for the amount demanded in the complaint. From that judgment no appeal was taken, and it stands as originally entered.

The question now presented is as to the liability of the sureties upon the bond for the full amount of the judgment in the Municipal Court. On the trial of the present action the court held that the liability of the sureties arising out of the extra-statutory condition above quoted was simply for the amount of the judgment entered in this court on the order of dismissal. The controlling words used and to be construed are, "after decision of the Supreme Court," and, of course, as against these sureties, they are to be construed with reasonable strictness. It is contended by the appellant that a dismissal under the rules is a decision within their meaning, but we think not, as did the court below. Certainly there was no decision upon the merits. Every question which could have been presented on that appeal might have been raised subsequently on an appeal from the judgment.

Upon an appeal to this court it may, under the statute 1878 G. S. ch. 86, § 5, reverse, affirm, or modify the judgment or order appealed from, and in either case the merits are determined and a decision reached. It has no statutory power to dismiss, except as provided in section 7. For the proper and orderly transaction of its business the rules under which the appeal in question was disposed of were adopted, and, when there is a failure to comply with them, the court may dismiss. If it abides by the rule and dismisses, or if, upon the other hand, it waives or excuses the noncompliance, there is no adjudication of the questions involved, no decision within the ordinary meaning of the word; nothing is determined or decided

but the motion to dismiss. Let us suppose that, pending litigation, the parties to an action formally stipulate that it shall abide and be governed by the decision of the appellate court upon questions of the same nature to be presented in another action already pending upon appeal, and because of a failure to comply with the provisions of 1878 G. S. ch. 86, § 7, or to observe the rules, that appeal is dismissed. It could not well be contended that the parties to the stipulation would be barred from asserting that there had been no decision within the meaning of the stipulation.

Again, under the rules of this court, the respondent on the former appeal was not confined to mere dismissal. It could have obtained an affirmance of the order appealed from, and, had such a course been pursued, all questions which could have been raised on that appeal would have been foreclosed. None of them could have been presented on an appeal from the judgment, affirmance under the rules being equivalent in such a case to a decision on the merits. In view of these rules, and the ordinary meaning of the word "decision" as used in legal instruments and proceedings, we are of the opinion that solely by virtue of the extra condition found in the bond, the plaintiff was not entitled to recover the amount of the judgment entered in the Municipal Court.

The amount recovered in the pending action was a trifle over \$20, and, on taxation of costs and disbursements, plaintiff was allowed \$10 as statutory costs. But, on appeal, this item was rejected. In *Greenman v. Smith*, (1874) 20 Minn. 418 (Gil. 370,) it was held that, under similar circumstances, a plaintiff was entitled to statutory costs, and in *Potter v. Mellen*, (1886) 36 Minn. 122, (30 N. W. 438,) it was assumed that the statute regulating costs had been rightly construed in the *Greenman* Case. Whatever our views might be, was this an entirely new question, we need not now indicate. But, evidently the people of the state have been satisfied with the statute respecting costs, as construed in the *Greenman* Case, for no legislative change or amendment has been made. After more than twenty years of acquiescence in this view of the statute by those most interested, we do not believe that we ought to place a wholly different construction upon it. To the amount of the judgment below there must be added the sum of \$10 as statutory costs, but no costs will be allowed in this court.

The case is remanded with instructions to amend the judgment appealed from as above indicated.

BUCK, J., absent, took no part.

CANTY, J. I dissent from so much of the foregoing decision as reverses the action of the court below in disallowing the item of \$10 statutory costs to plaintiff.

The statute regulating this question of costs is 1878 G. S. ch. 67, §§ 2, 3, as follows:

"Sec. 2. Costs are allowed to the prevailing party, in actions commenced in the District Court, as follows: *First.* To the plaintiff, upon a judgment in his favor of one hundred dollars or more, in *actions for the recovery of money only*, when no issue of fact or law is joined, five dollars. When an issue is joined, ten dollars. *Second.* In all other actions, except as hereinafter otherwise provided, ten dollars. *Third.* To the defendant, upon discontinuance or dismissal, five dollars. *Fourth.* When judgment is rendered in his favor on the merits, ten dollars.

"Sec. 3. In every action commenced in the district courts the prevailing party shall be allowed his disbursements necessarily paid or incurred." The following amendment was added to this section in 1868: "*Provided*, that in all actions for the recovery of money only, of which a justice of the peace has jurisdiction, the plaintiff, if he recover no more than fifty dollars, shall recover no disbursements; and if he recover less than fifty dollars, he shall pay the defendant's costs and disbursements."

Before the amendment the only provision allowing the plaintiff costs in actions for the recovery of money only was the first subdivision of section 2, which allowed him costs upon the recovery of a judgment of \$100 or more. It cannot be said that subdivision 2 applied at all to actions for the recovery of money only. If it did, we would have the legislature providing, in the first subdivision, for the recovery of \$10 costs when the plaintiff recovered as much or more than \$100, and, in the second subdivision, for the recovery of \$10 when he recovered less than \$100.

The only reasonable or proper interpretation of subdivision 2 is

as if it read: "In all other actions *than actions for the recovery of money only* except as hereinafter otherwise provided ten dollars."

The amendment of 1868, added as a proviso to section 3, detracts nothing from this interpretation; it simply distinguishes actions for the recovery of money only, where a justice has no jurisdiction,—that is, where more than \$100 is claimed in the complaint,—from actions where the justice had jurisdiction. In the latter case the plaintiff loses disbursements, as well as costs, unless he recovers no more than \$50, and pays both costs and disbursements if he recovers less. This proviso gave the plaintiff no statutory costs in any event.

This is an important matter. It is very common practice to exaggerate five or ten dollar cases into large claims, on paper, bring them in the District Court, waste the time of courts and juries, and put the public to expense in trying them; and this court should not put a premium on such practices by giving this statute an interpretation which it seems to me is not warranted by its language.

In my opinion, there is no statutory provision authorizing the taxation of statutory costs in favor of plaintiff in actions for the recovery of money only, unless he recovers as much as \$100 damages.

(Opinion published 58 N. W. 868.)

Application for reargument denied May 1, 1894.

CHARLES E. NELSON *vs.* ST. PAUL PLOW WORKS.

Submitted on briefs April 13, 1894. Affirmed April 20, 1894.

57	48
86	415

No. 3682.

Verdict justified by the evidence.

Evidence held to justify the verdict.

In an action by a servant for personal injury from defective machinery he need not point out the precise defect.

In an action by an employé against his employer for injuries caused by the alleged negligence of the latter, in failing to furnish him safe machinery with which to work, it is not essential to a recovery that the employé should

be able to show the precise nature of the defect, if it is made to appear that the accident occurred by reason of some defective condition of the machinery, chargeable to the negligence of the employer.

Appeal by defendant, the St. Paul Plow Works, a corporation, from an order of the District Court of Ramsey County, *John W. Willis, J.*, made July 29, 1893, denying its motion for a new trial.

The plaintiff, Charles E. Nelson, was in the employ of defendant working in its machine shop in St. Paul. The trip hammer at which he was temporarily at work was worn and out of order. He quit work for a few days and on his return was told by the foreman that it had been repaired. He went to work with it again and on November 13, 1891, while he was taking an iron from the die the hammer unexpectedly fell without being tripped and caught the first finger of his right hand and so injured it that it had to be amputated. He brought this action to recover damages claiming his injury was caused by the negligence of his employer in furnishing a defective and dangerous machine. Defendant answered denying negligence and charging plaintiff with contributory negligence. At the trial in May, 1893, plaintiff had a verdict for \$750. Defendant moved for a new trial. Being denied it appeals.

Kueffner, Fauntleroy & Searles, for appellant.

C. B. Smith and C. L. Smith, for respondent.

MITCHELL, J. We are of opinion that the evidence made a case for the jury, as to both defendant's negligence and plaintiff's contributory negligence.

If the evidence justified the jury—as we think it did—in finding that the “drop” fell because of the defective condition of the machine, and that such defective condition was chargeable to the negligence of the defendant, it was not essential to plaintiff's recovery that he should be able to show what the exact nature of the defect was.

Notwithstanding the fact that plaintiff knew of the previous defective condition of the machine, yet if defendant's foreman assured him (as the jury might have found) that it had been repaired, and was all right, his conduct in then going to work with the machine, if done in reasonable reliance on such assurances, did not amount to either negligence or a voluntary assumption of risks.

And in view of these same assurances, and the further fact that the evidence tended to prove that if the machine had been in good order the drop would not have fallen, except by use of the foot lever, it was for the jury to say whether plaintiff was guilty of negligence in placing his fingers where they would be struck by the drop, in case it should accidentally fall by reason of some defect in the machine. Any further discussion of the facts would serve no good purpose.

Order affirmed.

(Opinion published 58 N. W. 868.)

HENRY G. BLAKE vs. JOHN A. HOGAN.

Submitted on briefs April 8, 1894. Affirmed April 20, 1894.

No. 8614.

Dismissal justified by the evidence.

Upon an examination of the evidence submitted upon the trial of an election contest, it is held that the trial court was justified in dismissing the proceeding when contestant rested.

Appeal by contestant, Henry G. Blake, from an order of the District Court of Ramsey County, *J. J. Egan, J.*, made November 4, 1893, denying his motion for a new trial.

At a general election held in Ramsey County November 8, 1892, Henry G. Blake (Republican) and John A. Hogan (Democrat) were candidates for the office of county superintendent of schools for that county excluding the city of St. Paul. The board of canvassers on November 22, 1892, declared Hogan duly elected. Blake gave notice of contest pursuant to Laws 1891, ch. 4, § 95, and the matter was on January 27, 1893, heard and tried in the District Court of Ramsey County in the manner that civil actions are tried by the court without a jury. At the close of the testimony offered by the contestant the court on motion dismissed the proceeding on the ground that the evidence did not sustain the allegations of the no-

tice of contest. A case containing all the evidence given was made, settled, signed and filed and upon it and the records and files the contestant moved for a new trial. The court denied the motion and he appealed.

F. W. Zollman, for appellant.

C. D. & Thos. D. O'Brien, for respondent.

COLLINS, J. To succeed in this contest on the grounds taken by counsel for contestant in the court below and also in this court, it was incumbent upon him to show upon the trial that of the votes cast and counted for the contestee, respondent here, in the town of Mounds View, forty-two were unlawfully and illegally cast and counted. The proofs must have been of such weight and character as to have justified the trial court in deducting forty-two from the total number of votes received by the contestee, as that number was finally determined upon on an inspection and examination of the ballots involved, in accordance with the provisions of Laws 1891, ch. 4, § 96. Upon a perusal of the testimony, we are satisfied that it failed in this respect, and that the proceeding was properly dismissed by the court below.

The contestant attempted to show that forty-six of the votes cast and counted in the town before mentioned for the contestee were unlawfully and illegally so cast and counted. His counsel really admits that as to three of these the proof was short, and, upon a careful perusal of the testimony—especially the cross-examination—of the only witness by whom he attempted to prove that the electors numbered 8, 10, 12, 14, 36, 38, 39, 40 and 44 in the list found in his brief (9 in all) had voted for the contestee, we are constrained to hold it too indefinite and unsatisfactory for the purpose sought. These persons were all qualified electors, and to deprive them of the right to have their ballots counted, and at the same time to charge each vote cast by them to the contestee, the result being to change his apparent plurality of forty-one to a plurality of one for the contestant, the testimony should be fairly clear and convincing; and, as before remarked, it is not. The proof as to whom two or three or other electors voted for of the forty-six before mentioned is rather vague, but further discussion is unnecessary.

In view of what has been said, it is obvious that we are not required to determine whether the various provisions of Laws 1891, ch. 4, § 57, are mandatory or merely directory. Reference to other alleged errors need not be made.

Order affirmed.

(Opinion published 58 N. W. 867.)

E. P. ALEXANDER *vs.* CITY OF DULUTH.

Submitted on briefs April 16, 1894. Reversed April 30, 1894.

No. 8487.

Laws 1893, ch. 210, invalid.

Laws 1893, ch. 210, entitled "An act to authorize the construction of tunnels by cities in certain cases," *held* to be in conflict with the constitution, Art. 4, § 33, as amended in 1892, prohibiting the passage of any local or special law regulating the affairs of any county, city, etc., for the reason that the second section of the act adopts, and applies to the subject, existing special legislation contained in the charters of the various cities.

Uniformity in the affairs of cities; as to mode as well as to causes.

Under this constitutional provision, any act regulating the affairs of a city must reduce all cities, or all cities of the same class, to uniformity, in respect to the particular with which the legislation deals, as to the mode, as well as to the causes, of the exercise of the granted power.

Provisions of special charters can not be adopted and extended.

Any act which adopts and extends existing special legislation is as obnoxious to the constitution as if it created the special legislation which it thus attempts to extend and perpetuate.

Appeal by plaintiff, E. P. Alexander, from an order of the District Court of St. Louis County, *J. D. Ensign, J.*, made September 11, 1893, sustaining a demurrer to the complaint.

The plaintiff is a resident and taxpayer of the city of Duluth and brings this action in behalf of himself and all others similarly situated, to restrain the defendants, the city, the Common Council, Mayor and Board of Public Works of Duluth from using or allowing to be used any of the funds of the city in the construction of a

57	47
59	529
57	47
62	287
57	47
77	456
77	458
77	461
57	47
79	204
79	210

proposed tunnel from the main shore to Minnesota Point under the ship canal that connects the lake with the bay of Duluth. The complaint states they are about to expend a million dollars in such enterprise claiming to have authority under Laws 1893, ch. 210; that the statute is in conflict with the Constitution, Art. 4, § 33, as amended in 1892, and is void. The defendants demurred to the complaint and the sole question in issue was the constitutionality of that statute. The court held the statute to be valid and sustained the demurrer. Plaintiff appealed.

Allen & Baldwin, for appellant.

Laws 1893, ch. 210, is in reality a special act. *Nichols v. Walter*, 37 Minn. 264; *Allen v. Pioneer Press Co.*, 40 Minn. 117; *State v. Sheriff of Ramsey Co.*, 48 Minn. 236.

This statute was drawn by men who had these and other cases in mind, with a view of avoiding as far as possible the objections covered by these cases. The objection, however, to special legislation is one of substance and not of form. We may not be able in this case to point out any provision on the face of this act which of itself renders the act invalid, but we believe that a consideration of the peculiar provisions of the entire act will show it to be special legislation. It is designed to apply to certain conditions existing in the city of Duluth and is so drawn as not to apply to similar conditions existing or possible elsewhere in the State of Minnesota.

The act is not uniform in its operation throughout the state. In order that it may be carried into effect by the different cities, different methods of carrying on condemnation proceedings, of making assessments and of collecting the same, are employed in the various municipalities. Under the constitutional provision it is unlawful to make laws assessing benefits and damages through the diverse ways of this local legislation. If this part of the act be declared unconstitutional the rest cannot stand.

H. F. Greene, for respondents.

If we concede that the law should be uniform in its operation this statute fully complies with the requirement. This clause of the constitution means that the law should, so far as itself is concerned, work uniformly, not that its effect should be uniform, in

connection with other laws of a special and local character. Such lack of uniformity will not result from the operation of this law.

The general character of the law is not affected by the circumstances that there may be but a single locality falling within its operation, provided it is so framed as to be applicable to others if such should either presently exist or otherwise arise. The question is not as to the number of cases involved, but as to the rational basis for the classification irrespective of numbers.

The fact that the city may undertake this improvement when it deems the public interests require it so to do, that bonds may be issued without popular consent, and that it may be made without regard to the remonstrances of property owners are clearly matters of policy and have no bearing on the question whether the act is general or special, uniform or local, in its operation.

MITCHELL, J. The only point made on this appeal is that Laws 1893, ch. 210, entitled "An act to authorize the construction of tunnels by cities in certain cases," is invalid. Several objections to the act are alleged; but the only one which we find it necessary to consider is that it is in violation of the constitution, Art. 4, § 33, as amended in 1892, which provides that "the legislature shall pass no local or special law regulating the affairs of * * * any county, city, village," etc.; also, that "the legislature may repeal any existing special or local law, but shall not amend, extend or modify any of the same." We have had occasion so recently, in *State ex rel. v. Cooley*, 56 Minn. 540, (58 N. W. 150,) to fully consider this constitutional provision, that no extended discussion of its construction or application is required at this time. We discover nothing in the first section of the act that is obnoxious to the constitutional provision referred to. It authorizes any city which is or shall be so divided by unbridged navigable waters that portions thereof are inaccessible to each other, except by water transportation, if, in the opinion of the city council, the bridging of such water way would be impracticable, and the public interests require it, to construct a tunnel under such water way, so as to connect the divided portions of the city. It seems clear to us the physical condition of things here stated constitutes such substantial distinctions "as to suggest the necessity of different legislation with respect to it."

v.57M.—4

Nichols v. Walter, 37 Minn. 264, (33 N. W. 800;) *State ex rel. v. Cooley, supra*. The classification in that respect is complete, for it applies to every city, whether one or many, which is, or may hereafter be, similarly situated.

But it seems to us that the second section of the act is clearly repugnant to the constitution. After providing that property specially benefited by the improvement may be charged and assessed for a part of the expense, it then provides that "all proceedings with reference to such improvement and the making of the contract therefor, and the making and enforcement of assessments and re-assessments therefor, and for the procurement of funds for carrying on the work upon said improvement including all proceedings for the exercise of the power of eminent domain in connection with said improvement, shall, except as herein otherwise provided, conform as nearly as the nature of the case will admit, to proceedings which at the time shall obtain in the particular city, with reference to the grading and improvement of streets and the assessments therefor, it being the intention hereof that said improvement shall be considered as equivalent to the opening, grading and paving or macadamizing of a street, and subject, except as herein otherwise expressed, to the provisions of the several city charters with respect to the said last named improvements * * * and assessments therefor shall * * * be divided into the greatest number of annual installments, if any, which in the particular city may be admissible with reference to assessments for the grading, paving or macadamizing of streets."

If cities were organized and governed under and by a general law operating uniformly on all cities in the state, or upon all of each class, according to a proper basis of classification, it would have been entirely competent for the legislature to adopt the provisions of such a law by reference, and apply them, without repeating them in this act. But that is not the situation. We will take judicial notice of the fact that most, if not all, cities were, at the date of the adoption of the constitutional amendment, and still are, organized and governed under special charters containing about as many diverse provisions on the subjects enumerated in the second section of this act as there are charters. It would, perhaps, be difficult to find any two city charters whose provisions on these subjects are

entirely alike. This is certainly¹ special legislation which the legislature could not now pass, and which it is expressly prohibited from amending, extending, or modifying.

But instead of passing a general law, the provisions of which would operate uniformly on all cities, or all cities of the same class, the legislature has attempted, as to all matters specified in the second section, to adopt this whole mass of existing diverse special legislation, and extend its application to another and new class of cases, so that in proceedings to construct tunnels, under the act, there will be as many different laws as there are special city charters. This cannot be done. As is said in *Fitzgerald v. New Brunswick*, 47 N. J. Law, 484, (1 Atl. 496:) "The recognition of such local legislation by relying upon it as a foundation for new legislation which only changes, perpetuates, or perhaps increases, the previous local or special features created by special charters, is as inimical to the constitutional provision as if the last legislation created the diversity which it perpetuates. If all the special features of our city charters can be changed [or extended] with only the feeble restriction that the statute which changes [or extends] them shall apply to any other city or cities which may have similar features, then it will be a distant day when that homogeneity in municipal government of the state which the constitutional amendment was designed to bring about will be attained." Previous special legislation can never be made the basis of classification, and the legislature cannot touch it, except to repeal it.

Our view is that, under this constitutional amendment, any legislation touching any branch of city government must reduce all cities, or all cities of the same class, to uniformity in respect to the particular with which the legislation deals, and that this uniformity in the exercise of a granted power must be produced as to the mode, as well as to the causes, of its exercise. How far the second section of this act falls short of this will be apparent when it is considered that the situation is the same as if it expressly enacted, *seriatim*, all the diverse provisions of the various city charters on the subjects referred to.

The first part of the third section of the act is perhaps subject to the same objection, but we have no occasion to consider it.

The other provisions of the statute are so connected with, and

dependent upon, the provisions of section 2, that if the latter are invalid the entire act must fail.

Order reversed.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 866.)

FRANK TRUNTLE vs. NORTH STAR WOOLEN-MILL CO.

Argued April 9, 1894. Reversed April 20, 1894.

No. 8580.

Verdict not justified by the evidence.

Evidence *held* not to justify the verdict, for the reason that it appears that plaintiff was guilty of contributory negligence.

Negligence of the master was not the proximate cause of the injury to servant.

Even if a master is negligent in not giving his servant instructions and cautions as to the dangers of his employment, yet if the servant receives the same information and cautions from other sources, whether from other persons or from his own observation, and is nevertheless thereafter injured, the negligence of the master is not the proximate cause of the injury.

Contributory negligence not excused.

If a servant is advised of a particular danger, and of the proper precautions to avoid it, it is no excuse for a negligent exposure of himself to this danger, or for a negligent omission of such precautions, that he did not realize the full magnitude of the injury which would result therefrom.

Appeal by defendant, the North Star Woolen Mill Company, a corporation, from an order of the District Court of Hennepin County, *Thomas Canty, J.*, made July 8, 1893, denying its motion for a new trial.

On Tuesday, July 5, 1892, the plaintiff Frank Truntle commenced work for defendant for eighty cents a day in its mill at Minneapolis, and on the next Saturday his left arm was injured in one of its carding machines. He was fifteen years old on August 4, 1892. The third floor of the mill was occupied by a large number, about

forty, of these carding machines arranged in rows. He was taken there and told to observe the other operatives and was given charge of five of the machines. This action was brought to recover damages for this personal injury and was first tried in December, 1892, and plaintiff had a verdict for \$2,000. This verdict was set aside on defendant's motion and a new trial granted. At the second trial on April 26, 1893, the Judge charged the jury as follows:

"If you find from the evidence that the boy was of sufficient age and discretion to do this work without any special instructions, your verdict must be for the defendant. If the boy was young and inexperienced it was the duty of the defendant to instruct him in such safe methods of doing the work as are ordinarily employed in doing such work and it was its duty to warn him of the dangers to which he was exposed and to see that he not only understood these things but also that he appreciated the dangers to which he was exposed. If you find that the boy was not of proper age and discretion to be put at this work without special instruction and if you find that he was given proper instructions, then your verdict must be for the defendant. If you find that from his own experience, from the length of time he had been at work, he understood these dangers and had learned the proper way of doing the work, then your verdict must be for the defendant. If you find that he had learned from any source the proper way of doing this work and had a proper appreciation of the dangers connected with it, then your verdict must be for the defendant. But if you find that he did not understand and appreciate the dangers connected with this work and that he was not properly instructed and proper care was not taken to see that he did appreciate these things, and that he was injured by reason thereof, then your verdict must be for the plaintiff. If he were a grown person the rule would be that he should use ordinary prudence, and if he did not do so and thereby contributed to his own injury he could not recover. We do not apply that rule to a boy who has not got the capacity of a man, whose age and want of discretion does not give him the capacity of a man, but he must use the amount of care which a boy of his age should use. If he did not and his own carelessness contributed to the injury, then he cannot recover. Simply because he was a boy he was not exempt from the obligation to be careful.

"The only complaint is, that the boy did not understand the danger, that he did not have experience and he was not of the age and discretion to appreciate and understand the danger, and that the master neglected to warn him properly of the danger, and to use proper care to see that he appreciated it.

"An employer is not an insurer of the men he may employ in his business, and cannot be held liable for injuries which they may sustain while performing the duties of their employment, unless such injuries occur through, and result directly from, some negligent act or omission of the employer, and without fault or neglect on the part of the injured person."

Plaintiff had a verdict for \$5,750. Defendant moved the court to again grant a new trial but was denied and it appeals. The argument here was upon the facts.

J. W. Gilger and A. B. Jackson, for appellant.

The trial court erred in refusing to dismiss the action at the close of the plaintiff's testimony and again in refusing to direct a verdict for defendant at the close of defendant's testimony. The evidence failed to disclose sufficient facts to constitute negligence on the part of defendant. The plaintiff's evidence disclosed carelessness and negligence on his own part, directly contributing to the injury complained of. *Bohn Mfg. Co. v. Erickson*, 55 Fed. Rep. 943; *Buckley v. Gutta Percha & R. M. Co.*, 113 N. Y. 540; *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *Crowley v. Pacific Mills*, 148 Mass. 228; *Ciriack v. Merchants' Woolen Co.*, 146 Mass. 182; *Hickey v. Taaffe*, 105 N. Y. 26; *Probert v. Phipps*, 149 Mass. 258; *Coullard v. Tecumseh Mills*, 151 Mass. 85; *Pulmer v. Harrison*, 57 Mich. 182; *De Graff v. New York Cent. & H. R. R. Co.*, 76 N. Y. 125; *Atlas Engine Works v. Randall*, 100 Ind. 293; *Ludwig v. Pillsbury*, 35 Minn. 256; *Berger v. St. Paul, M. & M. Ry. Co.*, 39 Minn. 78; *Larson v. St. Paul & D. R. Co.*, 43 Minn. 488.

Larrabee & Gammons, for respondent.

There is no dispute between counsel about the correct rule of law governing the duty of a master toward an inexperienced minor servant put to work upon dangerous machinery. The difference between counsel arises in the application of well settled rules to

the facts in this case. About one half the cases appellant cites are from Massachusetts where the courts are greatly biased by sympathy with corporate interests as is said in 1 *Shearman & Redfield Negligence* (4th Ed.) § 189, Note 2. *Coombs v. New Bedford C. Co.*, 102 Mass. 572; *Chicago Anderson Pressed Brick Co. v. Reinneiger*, 140 Ill. 334; *Tagg v. McGeorge*, 155 Pa. St. 368; *Honlahan v. New Am. File Co.*, 17 R. I. 141; *Jones v. Florence Mining Co.*, 66 Wis. 277; *Thompson v. Johnston Bros. Co.*, 86 Wis. 576; *Rolling Mill Co. v. Corrigan*, 46 Ohio St. 283; *Steiler v. Hart*, 65 Mich. 644; *Missouri Pac. Ry. Co. v. Perogoy*, 36 Kans. 424; *Dowling v. Allen*, 102 Mo. 213; *Wynne v. Conklin*, 86 Ga. 40; *Whitelaw v. Railway Co.*, 16 Lea 391; *Hinckley v. Horazdowsky*, 133 Ill. 359; *Railroad Co. v. Fort*, 17 Wall. 553.

Inexperienced minors must be instructed in the manner in which the work may be done safely. *Parkhurst v. Johnson*, 50 Mich. 70; *Ingerman v. Moore*, 90 Cal. 410; *Reynolds v. Boston & M. R. Co.*, 64 Vt. 66; *Pullman Palace Car Co. v. Harkins*, 55 Fed. Rep. 932; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242; *Leigh v. Omaha St. Ry. Co.*, 36 Neb. 131.

MITCHELL, J. This action was brought to recover for personal injuries sustained by plaintiff (a boy of fifteen years) while employed as a "helper" in defendant's carding room, by having his arm caught between the rollers of the carding machine.

The negligence charged against the defendant was failing to give plaintiff proper instructions how to perform his work, or proper cautions as to the dangerous character of the machinery, and as to what it was necessary for him to do in order to avoid injury to himself while tending the machine. The charge of the court was an accurate and concise, yet complete, statement of the general principles of law applicable to this class of cases, and the only question here is whether the evidence justified the verdict. A perusal of the record would, we think, impress any one that the evidence of negligence on part of the defendant, proximately contributing to the injury, was, to say the least, very weak, and the evidence tending to prove contributory negligence on part of the plaintiff quite strong; the only question being whether, on these

two points, it made a case for the jury,—often a very delicate and embarrassing question in this class of cases. It is unnecessary to describe in detail the construction or operation of these carding machines, which will be well understood by all who are familiar with them. It will be enough for present purposes to refer to a few facts which will explain wherein we think the evidence is insufficient to support the verdict. The duties of a “helper” are to insert the ends of the woolen strands in the proper feed spaces in the feed board in front of the creel, to substitute full spools on the creel for those which have been run off empty, and to take off the full spools of carded wool at the back of the machine, and replace them with empty ones. The slits in the feed board, while wide enough to admit the woolen strands, are too narrow to permit the fingers of the helper to pass through. The distance from this feed board back to the “main cylinder” is eighteen inches, and to the “stripper” fourteen inches, and the distance between the feed board to the ends of the semicircular creel from which the wool was fed was in this case about seven inches. None of the duties of a helper required him to come in contact with any part of the revolving machinery, or to have any part of his person back of the feed board, except that, when passing along the aisles between the machines, he had, of course, to pass near the cog wheels by which the cylinders are turned. The proper and usual mode of putting the strands into the feed board is to throw them from the back of the creel up over a bar on the front, where they could be handily reached from the side, and inserted in the proper slit in the feed board.

There is nothing unusually dangerous about these machines. They had been tended in this room by boys of about plaintiff's age for twenty years, and no previous accident had occurred. The only danger incident to their use arises from coming in contact with the cog wheels while passing along the aisles, or from allowing the clothing to come in contact with the rough surface of the card cloth on the revolving cylinders or rollers, which would be liable to result in drawing it, and the member of the body covered by it, in between the rollers, the same as it does the woolen strands. The surface of this card cloth consists of numerous fine-wire spikes or points. These dangers are not hidden, but would be apparent

to any adult, at least, of ordinary intelligence. While plaintiff claimed that the defendant gave him no instructions as to how to do his work, yet he admits that he knew how to do it, because he had watched others, and saw how they did it. He had visited the carding room two or three times before he was employed by defendant, and had been at work tending the machine four or five days before the accident. Defendant's foreman had cautioned him not to get his fingers in the cog wheels by which the cylinders were revolved. He admits that one of the other operatives told him to keep his shirt sleeves rolled up. On the first trial he also testified that the operative told him to do this in order to avoid getting his hand or arm caught between the rollers. On the last trial he denied that he was told the object of rolling up his sleeves, but admitted that he knew that the object was to prevent their being caught by the rollers, and that, if he did not keep them rolled up, they were liable to be caught and pulled in just as the wool was. He said, however, that he did not know that it would also pull in his arm, and did not know but that he could jerk his sleeve out. It is utterly inconceivable that a boy of his age supposed that the precaution was intended merely for the protection of his shirt, and not of his person.

It appears from his own testimony that on the day of the accident he had unbuttoned his shirt sleeves, and rolled them up above his elbows, but that, having no way of fastening them up, the left one had come down, or partly down, and was in this loose and unbuttoned condition at the time of the accident. His testimony is quite confused as to his precise position when he was injured. He says that, the end of one of the woolen strands having fallen on the floor, between the creel and the feed board, he went entirely in between the two, and near the center of the concave side of the creel, for the purpose of picking it up and inserting it into the feed board. This, for reasons obvious to those familiar with the machines, is highly improbable; but, if true, he was where he had no occasion to go, and where he admits he had never seen any other helper go, although he says he himself had done so before. The matter, however, is not important, in view of what he says as to how the accident occurred, because it does not appear that it in any manner approximately contributed to the injury. He says that after he had picked

up the strand from the floor, and had "got up" or "stood up," and was trying to stick the strand into the feed board with his right hand, his attention was attracted by a noise at one of the other machines, and, just after he had looked in that direction, his left sleeve was caught, and drew his arm in between two of the rollers (a "stripper" and "worker," resting on the main cylinder); that he did not know at the time how close his sleeve was to the rollers; that he was not thinking at the time about his left arm, having forgotten about it. The short of all this is that in forgetfulness of the condition of his sleeve, and of the danger from its coming in contact with the rollers, he, for some unexplained reason, extended or threw his arm quite a distance back of the feed or finger board,—a place where it had no right to be, and where there was no occasion for its being. We believe this to be a fair statement of the facts, accepting as true the evidence most favorable to the plaintiff.

There is no doubt of the duty of an employer to give youthful or inexperienced employes all proper and needful cautions as to dangers in the employment which are not apparent, or which the employé, by reason of his youth and inexperience, may not be reasonably expected to appreciate; but no duty rests upon a master to notify even a minor of the ordinary risks and dangers of his occupation which the latter actually knows and appreciates, or which are so open and apparent that one of his age and capacity would, under like circumstances, by the exercise of ordinary care, know and appreciate. It is not enough to render a person liable that he was negligent. His negligence must have been the proximate cause of the injury complained of. Hence, even if defendant was negligent in failing to give proper instructions or cautions to plaintiff, yet, if the latter obtained the same information and cautions from any other source, whether from other persons or from his own observation and experience, the negligence of the defendant was not the proximate cause of plaintiff's injury. Another proposition, we think, must be equally true, viz. that, if a person is informed of a particular danger and as to the proper precautions to prevent it, it is no justification or excuse for a negligent exposure of himself to that danger, or for a negligent omission of such proper precautions, that he may not have realized the full magnitude of the injury to himself which was liable to result from such negligence.

Applying these principles to the facts, the case in hand, from a legal standpoint, stands just as if the defendant, when it employed the plaintiff, had instructed him as to the proper manner of doing his work, and had cautioned him not to get his fingers in the cog wheels, and had cautioned him that, if the sleeves came in contact with the rough surface of the revolving cylinders, it would catch and draw them in between the rollers, just as it did the wool, and that, to avoid any such thing, he should keep his sleeves rolled up. Had defendant done this, it is difficult to see what else reasonable care, which was the measure of defendant's duty, could have required.

But, waiving the question of defendant's negligence, we find that plaintiff was advised of the danger from his sleeves coming in contact with rollers, and directed to keep his sleeves rolled up in order to avoid it; yet he not only disregarded this precaution, but, in a moment of forgetfulness or thoughtfulness, extended his arm with this loose sleeve clear back of the feed board,—a place where there was neither necessity nor occasion for its being. The result was that his sleeve was caught and pulled in between the rollers, pulling in his arm with it. The fact that he had forgotten about the previously known danger, and had forgotten to adopt the suggested precaution to avoid it, or the further fact that he may not have realized the full extent of the injury to which such forgetfulness and neglect would expose him, and that he might have, as he claims, supposed that, if caught, he could jerk out his sleeve before his arm was drawn in, will not, one or all, relieve him of the charge of contributory negligence. On this ground, if not on the other also, we think that the verdict was not justified by the evidence.

Order reversed.

BUCK and CANTY, JJ., took no part.

(Opinion published 53 N. W. 832.)

PIONEER SAVINGS & LOAN CO. vs. ANSON E. FULLER.

Submitted on briefs April 4, 1894. Affirmed April 20, 1894.

No. 8387.

Fixtures as between landlord and tenant.

A mortgagor, in possession of real property pending the expiration of the year of redemption from a foreclosure sale, and his tenant, may, without the concurrence of the purchaser at the sale, enter into an agreement for the annexation of a chattel to the real property by the tenant of such a nature that it can be detached without being materially injured and without material injury to the things real, whereby the chattel shall remain personal property, removable by the tenant during the year of redemption.

Appeal by plaintiff, the Pioneer Savings and Loan Company, a corporation, from an order of the District Court of Hennepin County, *Seagrave Smith and Frederick Hooker, JJ.*, made July 11, 1893, denying its motion for a new trial.

Elwood S. Cook owned lot seven in block sixteen of Calhoun Park Addition, Minneapolis, with the dwelling house thereon and on July 1, 1890, mortgaged it to plaintiff to secure the payment of \$4,000 and interest. The house was not completed and Cook agreed to finish it according to plans and specifications. These included a mantle, grate and tiling. On June 13, 1891, the mortgage was foreclosed and the house and lot sold by the sheriff to the plaintiff for \$4,369.49 and a certificate of sale executed and recorded. The sale was made under a power contained in the mortgage and the premises were subject, under 1878 G. S. ch. 81, § 13, to redemption at any time within twelve months thereafter. On September 10, 1891, Cook leased the property to the defendant, Anson E. Fuller, for a year and agreed with him that he might place a mantel, grate and tiling in the house for a fireplace, and in case Cook desired to purchase them he could do so at cost; otherwise defendant could remove them. Fuller put them in and had them set in the usual manner. They were worth \$40. About June 1, 1892, Cook notified Fuller that he did not desire to purchase, and prior to June 13, 1892, defendant took down the mantel, grate and tiling and stored them on the premises. He remained in the house

until September 10, 1892, when he removed and took away the mantel, grate and tiling. The real estate was not redeemed from the foreclosure sale and plaintiff became the owner thereof and brought this action to recover the possession of the mantel, grate and tiling; claiming they were fixtures and a part of the house and became its property by the foreclosure and non-redemption. The defendant answered, a jury was waived and the action tried by the court. Findings were made of these facts and judgment ordered for defendant. Thereupon plaintiff moved the court on notice to set aside the findings and grant a new trial. Being denied it appealed.

George D. Emery, for appellant.

By virtue of its mortgage plaintiff became entitled, at common law, by statute and by the terms of the mortgage itself, to all improvements and fixtures subsequently placed on the land whether with, or without, its consent. If Cook had himself placed the mantel, grate and tiling in the building he could not have removed or detached it without the consent of the mortgagee. How then could he convey the right to another to do that which he could not do himself. The placing of this mantel, grate and tiling, was in exact performance of one of the conditions on which the loan was originally made. The house was to contain one mantel, &c. *Cherry v. Arthur*, 5 Wash. St. 787; *Butler v. Page*, 7 Met. 40; *Arnold v. Crowder*, 81 Ill. 56; *Merritt v. Judd*, 14 Cal. 60; *Roberts v. Dauphin Deposit Bank*, 19 Pa. St. 71.

If a mortgagor lease the mortgaged premises and the tenant erects fixtures thereon with the understanding with the mortgagor that they will be removable at the end of the term, they become a part of the realty and cannot be removed by the tenant as against the mortgagee. *Frankland v. Moulton*, 5 Wis. 1; *Lynde v. Rowe*, 12 Allen 100; *Smyth v. Sturgis*, 108 N. Y. 495; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Voorhees v. McGinnis*, 48 N. Y. 278; *Wright v. Gray*, 73 Me. 297; *Woodham v. First Nat. Bank*, 48 Minn. 67.

Goebel & Gjertsen, for respondent.

The foreclosure sale does not give ownership. The purchaser's title is not complete until the time for redemption has expired.

Donnelly v. Simonton, 7 Minn. 167; *Loy v. Home Ins. Co.*, 24 Minn. 315; *Berthold v. Holman*, 12 Minn. 335; *Tift v. Horton*, 53 N. Y. 377.

Cook had the right to make the agreement with Fuller, and Fuller had the right to remove the mantel in question as he did, according to the agreement. *Ferris v. Quimby*, 41 Mich. 202; *Globe Marble Mills Co. v. Quinn*, 76 N. Y. 23.

An agreement may be made between the owner and his tenant that a chattel may be attached to the freehold, and thereafter and before the expiration of the lease, removed by the tenant, provided it can be detached without material injury to the realty. The chattel does not become a part of the realty or lose its character as personal property. *Ford v. Cobb*, 20 N. Y. 344; *Warner v. Kenning*, 25 Minn. 173; *Stout v. Stoppel*, 30 Minn. 56; *Shapira v. Barney*, 30 Minn. 59; *Little v. Willford*, 31 Minn. 173; *Ingalls v. St. Paul, M. & M. Ry. Co.*, 39 Minn. 479.

When plaintiff bid in the property on June 13, 1891, it bid it in without the mantel, as at that time it was not yet placed in the building. There was no injury to the freehold and none was claimed by plaintiff. It received just what it expected at the sale under foreclosure, and has nothing to complain of.

A fire frame may be removed. *Gaffield v. Hapgood*, 17 Pick. 192. A furnace may be removed. *Baldwin v. Merrick*, 1 Mo. App. 281; *Kelsey v. Durkee*, 33 Barb. 410. Hearth stone may be removed. *Poole's Case*, 1 Salk. 368. Grates and ranges fixed in brick work may be removed. *Lee v. Risdon*, 7 Taunt. 188; *Rex v. St. Dunstan*, 4 B. & C. 686. Even a chimney may be removed. *Moore v. Wood*, 12 Abb. Pr. 393.

A mortgage given upon chattels which afterwards are attached to the freehold, is paramount and superior to a prior real estate mortgage. *First Nat. Bank v. Elmore*, 52 Ia. 541; *Eaves v. Estes* 10 Kans. 314; *Tift v. Horton*, 53 N. Y. 377; *Henry v. Von Brandstein*, 12 Daly 480; *Miller v. Wilson*, 71 Ia. 610; *Lansing I. & E. Works v. Walker*, 91 Mich. 409.

COLLINS, J. When the annexation of a chattel to real property by a tenant is of such a nature that it can be detached without

being materially injured, and without material injury to the things real to which it is annexed, and there is an agreement between a landlord and the tenant that the chattel shall remain personal property notwithstanding the annexation, the chattel will, as between them, retain that character. *Warner v. Kenning*, 25 Minn. 173. See, also, *Stout v. Stoppel*, 30 Minn. 56, (14 N. W. 268;) *Ingalls v. St. Paul, M. & M. Ry. Co.*, 39 Minn. 479, (40 N. W. 524.) The respondent had the right, therefore, as against his landlord, to remove the mantel and tiling, and this seems to be admitted.

The real question here is as to his right to detach and remove the property during his term under the lease, and prior to the expiration of the period fixed by law within which the landlord had the right to redeem from the mortgage foreclosure sale. During this period the mortgagor landlord was entitled to full possession of the premises, and to all rents and profits arising therefrom. The purchaser at the sale stood in no other or different position in these respects than did the mortgagee prior to the sale. Either could prevent or restrain waste, but both were powerless to interfere with the mortgagor's right to possession and to become a landlord.

If we did not regard the question now before us as already settled in this court, we should not hesitate to say that the respondent tenant had the right to detach and remove the property in question, as agreed upon between his landlord and himself. But in the recent case of *Merchants' Nat. Bank v. Stanton*, 55 Minn. 211, (56 N. W. 821,) it was held that, where it was agreed between the owner of mortgaged real property, in possession, and another person, that the latter might erect a building upon the land, and that it should remain the personal property of the person who erected it, the absence of a concurrent agreement to that effect on the part of the mortgagee would not of itself make the building a part of the mortgage security, although it was so built that, in the absence of any agreement to the contrary, it would have become a part of the realty. The reasoning in that case is applicable, and fully covers the question now under consideration. See, also, *Tiffit v. Horton*, 53 N. Y. 377.

The counsel for appellant argues that the court erred in finding that the mantel and tiling were detached prior to the expiration

of the year of redemption. There was some dispute over this, but there was evidence to warrant the finding as made, just as there was evidence which would have supported a contrary finding. This covers all assignments of error which need special mention.

Order affirmed.

(Opinion published 58 N. W. 831.)

ELIZABETH M. VANDIVER *vs.* J. C. O'GORMAN.

Submitted on briefs April 4, 1894. Affirmed April 20, 1894.

No. 8581.

Mortgage to a stranger is not a defense in trover and conversion.

In an action of trover by the mortgagor of personal property against a mere wrongdoer who is a stranger to the mortgage, it is no defense that there is a default in the mortgage which is held by a third party, and due and payable.

Measure of damages in such case.

In such a case the plaintiff, being entitled to the possession of the property converted, is entitled to recover the full value of the property, and not merely the excess in value over the sum secured by the mortgage.

Appeal by defendant, J. C. O'Gorman, from an order of the District Court of Washington County, *W. C. Williston, J.*, made February 21, 1893, denying his motion for a new trial.

On March 6, 1891, J. S. Vandiver was the owner of a job printing press, thirty six fonts of job type, some large wood type and two cherry cabinets of the value of \$400. On that day he mortgaged this property to David Tozer to secure the payment of his note for \$150 and interest, due June 6, 1891. He soon after delivered the property to defendant to be stored in the Union Station building in Stillwater. On July 15, 1891, defendant by his agent sold it at auction with a large amount of other property belonging to him. Vandiver soon after demanded his property, but could not obtain it. He then sold his right to the property and assigned his claim to his wife, the plaintiff Elizabeth Vandiver, and she brought this

action to recover its value with interest from the time of the conversion. The debt to Tozer remained unpaid. The defendant answered and on the trial November 15, 1892, these facts appeared. The Judge instructed the jury to assess the value of the property and return a verdict for the plaintiff for the amount. Defendant excepted. The jury returned a verdict for \$417.60. Defendant moved for a new trial. Being denied he appealed.

Kueffner, Fauntleroy & Searles, for appellant.

Our position is that David Tozer was the owner of the property and entitled to the possession, the mortgage debt being past due and unpaid, and he alone could sue for a conversion. Where property is taken by a stranger the mortgagee (Tozer) may recover the entire value, holding the excess over his special interest in trust for the mortgagor (Vandiver.) *Russell v. Butterfield*, 21 Wend. 300; *Cushing v. Seymour, Sabin & Co.*, 30 Minn. 301; *Adamson v. Peterson*, 35 Minn. 529.

The recovery by Vandiver would not protect defendant from another action by Tozer the mortgagee. The title is conveyed to him, subject to be defeated on payment of the debt, and in the absence of stipulation to the contrary he has the right of possession. *Mann v. Flower*, 25 Minn. 500; *Fletcher v. Neudeck*, 30 Minn. 125; *Kellogg v. Olson*, 34 Minn. 103; *Close v. Hodges*, 44 Minn. 204. Plaintiff has no title, no possession, no right of possession. She has a mere right of redemption by paying to Tozer the amount of his mortgage debt, and she will be fully compensated by allowing to her damages equal to the value of the property less the amount of the debt secured upon it.

Henry & R. L. Johns, for respondent.

A mortgagor after default and before the mortgagee has exercised his right to take possession of the property, has a sufficient interest in it to maintain an action for its conversion. *Hall v. Sampson*, 35 N. Y. 274; *Hathaway v. Brayman*, 42 N. Y. 322; *Tallman v. Jones*, 13 Kans. 438.

An agister, a carrier, a factor, may bring trover; even a general bailment made for no special purpose but only for the benefit of the

rightful owner will enable the bailee to bring trover and conversion. *Faulkner v. Brown*, 13 Wend. 63; *Beger v. Busch*, 50 Ala. 19; *Russell v. Butterfield*, 21 Wend. 300.

In trespass *de bonis asportatis* possession is enough to sustain the action. *Hanmer v. Wilsey*, 17 Wend. 91; *Duncan v. Spear*, 11 Wend. 54.

The recovery of damages either by the bailor or by the bailee deprives the other of his right of action. *Armory v. Delamirie*, 1 Smith's Leading Cases, 636.

CANTY, J. The plaintiff brought an action of trover against the defendant for the conversion of certain personal property. The defendant, among other things, answered that one David Tozier held a mortgage on the property. The bill of exceptions states that upon the trial it appeared that the amount of this mortgage was the sum of \$150, and that it was due and payable to Tozier at the time of the conversion by defendant. The court below held that, as between plaintiff and defendant, the existence of this mortgage was no defense, ordered a verdict for plaintiff, and left it to the jury to assess the amount of the damages; and, from an order denying a motion for a new trial, defendant appeals.

We are of the opinion that the order appealed from should be affirmed. The plaintiff held the rights of the mortgagor, who was entitled to possession until the mortgagee saw fit to enforce the default in the mortgage. As between plaintiff and a wrongdoer who was a mere stranger to the mortgage, she was entitled to recover the full value of the property converted. The mortgagee did not interfere or make any claim against the defendant for the property or its proceeds, and the plaintiff was entitled to recover the full amount of these proceeds, and hold, as trustee, the amount due the mortgagees. *Jellett v. St. Paul, M. & M. Ry. Co.*, 30 Minn. 265, (15 N. W. 237.)

Proof that the right of a third person is superior to that of the plaintiff is not sufficient unless it has the effect of disproving the right of plaintiff to possession, as between himself and defendant.

Although the loss of the mortgagor may be less than it would be if his title was not incumbered, still it is well-settled law that

his recovery will extend to the full value of the chattel, because anything short of this will enable the defendant to profit by his own wrong.

The authorities on this point are cited in the note to *Armory v. Delamire*, 1 Smith, Lead. Cas. 374 (8th Ed. p. 679.)

Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 881.)

HANS CHRISTOFFERSON vs. WILLIAM HOWE.

57	67
84	186

Argued April 12, 1894. Affirmed April 20, 1894.

No. 8764.

Account stated.

When an account is stated, the balance struck becomes an original demand, the transaction amounts to an express promise to pay that balance, and, except in case of fraud or mistake, the account cannot be examined to ascertain the items of that balance.

Settlement of mutual accounts and note for the balance is satisfaction of the items.

When a new note is given in settlement of the balance due on mutual running accounts of which a debt secured by a mortgage formed only a part, it is a satisfaction, and not a renewal, of that mortgage.

Appeal by plaintiff, Hans Christofferson, from an order of the District Court of Marshall County, *Frank Ives, J.*, made January 26, 1894, denying his motion for a new trial.

The plaintiff owned a farm in Tamarack, Marshall County, and made a contract in 1890, with defendant William Howe to work it, raise wheat and deliver it to plaintiff, and was to be paid therefor one half of the money realized on the sale of the wheat. Plaintiff furnished some supplies and advanced money for Howe, and on October 28, 1890, they had a settlement of accounts and there was found due plaintiff \$377.90. Howe gave his note for the amount due November 1, 1891, and secured it by a mortgage upon a horse,

wagon, binder, plow and harness. Howe worked the farm again the next year on the same terms and on December 1, 1891, had another accounting and settlement of all their mutual accounts and claims including Howe's half of the wheat raised that year and plaintiff's advances and the note for \$377.90 and interest. A balance was struck and there was found due to plaintiff \$263.20, for which sum Howe gave plaintiff his note due November 1, 1892. Howe failed to pay this note and in July, 1893, plaintiff claimed that the chattel mortgage was security for this debt, as it contained a provision that it should be security for the payment of the note for \$377.90 or any other note of the mortgagor given thereafter to plaintiff as a renewal thereof. On July 22, 1893, plaintiff demanded the property and being refused commenced this action of replevin for its recovery. Howe answered that the mortgage was paid and extinguished by the accounting and settlement made December 1, 1891. The issues were tried November 23, 1893, and these facts appearing by the evidence the court dismissed the action. Plaintiff made a bill of exceptions and moved the court for a new trial, but was denied and he appeals.

Brown & Carr, for appellant.

A debt evidenced by a promissory note and secured by a chattel mortgage is not fully paid, so as to satisfy and cancel the mortgage by paying a part in cash and giving a note for the balance. In the absence of an agreement that a new note is received in payment it will be held to be but new evidence of the old debt. *Hanson v. Tarbox*, 47 Minn. 433.

The mortgage was given to secure the payment of the note therein described or any other note of said mortgagor given thereafter to the mortgagee as a renewal thereof. If the taking of a new note discharged the old one, still this would not affect the validity of the mortgage. It would stand to secure the new note. *Jones, Chattel Mortgages*, § 89, note 8.

On December 1, 1891, the plaintiff and defendant had a mutual accounting and settlement of all claims held by each against the other. The note described in the mortgage was included with others. This settlement cannot be construed to be a payment. 22 Am. & Eng. Enc. of Law, 488.

H. W. Brown and Brown & Bayrell, for respondent.

The new note was not given in renewal of the old one but on the contrary it was for the balance of a subsequent account including the old note. The balance of the account stated between the parties is not the same debt that was secured by the chattel mortgage.

CANTY, J. On October 28, 1890, defendant made and delivered to plaintiff a promissory note for \$377.90, and, to secure it, also made to plaintiff a chattel mortgage on some horses, harness, and farm utensils. Plaintiff brought this action to recover from defendant possession of a part of this property under this mortgage.

On the trial it appeared that on December 1, 1891, plaintiff and defendant had a settlement of a mutual running account, consisting of several items on each side, the charges in plaintiff's favor amounting to \$1,125.95, including this item of \$377.90 due on this note, and the payments on this account amounted to \$862.75, leaving a balance due plaintiff of \$263.20. This account was duly stated, and defendant gave a new note for \$264 as the balance due.

Plaintiff claims that this note is a mere renewal of the first note, and the mortgage given to secure the first note stands as security for the so-called renewal note. We are not of that opinion. When an account is stated, the balance struck becomes an original demand, the transaction amounts to an express promise to pay that balance, and the account cannot be examined to ascertain the items of that balance. *Hawkins v. Long*, 74 N. C. 781; *McClelland v. West*, 70 Pa. St. 183; 1 Am. & Eng. Enc. Law, 124.

When a new note is given in settlement of the balance due on mutual running accounts of which a debt secured by a prior mortgage formed only a part, it is a satisfaction, and not a renewal, of that mortgage. *Walters v. Walters*, 73 Ind. 425.

There is a clause in plaintiff's mortgage which provides that it shall secure "any other note of said mortgagor given hereafter to the mortgagee herein as a renewal hereof."

We cannot see that this helps the plaintiff's case any, or gives him anything but what the law would give him in the absence of this provision. We are of the opinion that the mortgage under which plaintiff seeks to recover was satisfied by the subsequent settlement,

and that the court below committed no error in dismissing his action. As this disposes of the case, we will not pass on the other points discussed.

The order denying plaintiff's motion for a new trial is affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 830.)

CHARLES W. ELSTON *et al.* vs. AARON FIELDMAN.

Submitted on briefs April 10, 1894. Affirmed April 20, 1894.

No. 8646.

The trial was confined to the issues made by the pleadings.

Held, that the case does not show consent in the court below to try other issues than those made by the pleadings.

Sale of passage ticket.

The seller of a ticket for passage issued by a common carrier does not, from the sale alone, undertake for anything beyond the genuineness of the ticket.

Consideration of a contract.

A contract *held* to be on a sufficient consideration.

Appeal by defendant, Aaron Fieldman, from an order of the Municipal Court of the City of Duluth, *Eric L. Winje*, J. made November 25, 1893, denying his motion for a new trial.

On July 9, 1892, Charles W. Elston and Charles A. Britts were partners in business as bankers and ticket brokers at Duluth. They agreed with defendant on that day to sell to him and send to his brother's family in Odessa, Russia, passage tickets from Hamburg, Germany, to Duluth in this state. Defendant paid them therefor \$248.50 and they sent the tickets, but on account of the prevalence of cholera in Russia the family was refused passage through Austria and was delayed five months. When they reached Hamburg the steamship line refused for the same cause (it is supposed) to carry steerage passengers, and the tickets were useless. Defendant received an account of the matter and procured and sent sec-

ond class instead of steerage tickets. He applied to Elston & Britts for return of his money and on March 21, 1893, they paid him \$190 and entered into an agreement with him to apply to the steamship company's agents and get back as much of the \$248.50 as possible and to pay him any excess received over \$190, and he agreed to repay to them any deficiency. The plaintiffs obtained but \$170 and brought this action to recover the remaining \$20. Defendant answered stating all the details at much length and demanded judgment against plaintiffs for the remaining \$58.50 and interest. At the trial on October 13, 1893, the court ordered judgment for plaintiffs for the twenty dollars. Defendant moved for a new trial. Being denied he appealed to this court.

Austin N. McGindley, for appellant.

McMahon & Mitchell, for respondents.

GILFILLAN, C. J. The appellant, when in this court, attempts to shift his ground of defense and counterclaim, as presented in his answer. The ground set forth in the answer is that the plaintiffs sold to defendant's brother, L. Fieldman, steamship and railroad tickets for the passage of his family from Hamburg, Germany, to Duluth, in this state, and that the tickets were worthless. Here the appellant claims that the transaction was a contract on the part of the plaintiffs to transport said family from Hamburg to Duluth, which they failed to perform. The court below found the transaction to have been what it is alleged in the answer,—a sale of tickets,—and also that the tickets were valid; and, on those findings, both the defense and the counterclaim failed. It might, from some of the evidence, be spelled out or inferred that the transaction was something different from the ordinary case of a sale of tickets; but there was not enough of such evidence to show that the parties, by consent, tried, or were understood by the trial court as trying, any other issues than those made by the pleadings.

A ticket issued by a common carrier of passengers for passage between two points is evidence of a contract to carry between such points as indicated on it; and, unless the right to use it is limited upon it to a particular person, the holder has a right to be carried as indicated by it. Such tickets have come to be bought and sold, and passed from hand to hand, almost as any article of merchan-

dise. By the mere sale of such a ticket the seller does not undertake to transport the buyer, nor contract that the carrier will do so, nor bind himself for anything except the genuineness of the ticket.

In this case the steamship tickets were what are called "steerage tickets." For some reason, not clearly disclosed by the evidence, the steamship company refused, for the time, to carry from Hamburg on steerage tickets. But there was no evidence that the tickets sold by plaintiffs were not genuine. The defense and counterclaim depended on proof by defendant of that fact, and, as it was not proven, of course they failed.

Reading the contract sued on in connection with the circumstances to which it refers, we gather from it that the plaintiffs were to procure to be refunded by some one—the steamship or railroad companies—as much as they could on account of the unused tickets. They were under no legal obligation to do so, and their undertaking to do it, as well as their payment to defendant of the money mentioned in the contract, furnished a consideration for defendant's promise to them.

The claim now made by appellant, that he executed the contract sued on only as agent for L. Fieldman, is contrary to his answer, which admits, unqualifiedly, that he executed it, and which also alleges that he had no authority from L. Fieldman to execute it.

Order affirmed.

(Opinion published 58 N. W. 890.)

VILLAGE OF WEST DULUTH *vs.* JAMES H. NORTON *et al.*

Submitted on briefs April 9, 1894. Reversed April 20, 1894.

No. 8639.

Counterclaim in action by a trustee for the cestui que trust.

Where a village organized under Laws 1891, ch. 146, takes the bond of a contractor, conditioned for the faithful performance of the contract, and that he will pay for all labor and material furnished, as provided in subch. 9, § 4, of that statute, and such village brings an action on such bond to recover the sum due from the contractor to a third party so furnishing

material, but claims nothing in its own right, *held*, that such suit is brought in a representative capacity, and it is no defense to it that the plaintiff has in its hands more than sufficient funds withheld from the contractor to pay all such claims.

Appeal by plaintiff, the Village of West Duluth, from an order of the District Court of St. Louis County, *J. D. Ensign, J.*, made October 14, 1893, overruling its demurrer to the answer.

The plaintiff is a Municipal Corporation organized under Laws 1891, ch. 146. On July 5, 1892, the defendant, James L. Norton, entered into a contract with the village to construct for it an addition to its city hall, and therein agreed to pay for materials furnished by any person or party to carry on the work. As security for such payment and performance Norton as principal and the defendants, Charles W. Hoyt, L. L. Marble and W. L. McMinn, as sureties, at the same time executed a bond to the village in the penal sum of \$5,000, with the condition that if Norton performed the contract and paid for all materials furnished and work done, then it should be void, otherwise of force. It was further provided therein that any person who might have a just claim for labor performed or material furnished might bring action on the bond and recover therefor in the name of the village, in any court having jurisdiction. On September 21, 1892, the Pioneer Fireproof Construction Company, a corporation, sold and delivered to Norton materials for the work to the value of \$118. He did not pay and this action was brought on the bond to recover that amount for its use and benefit. The defendants answered that the village had withheld and then had in its possession funds belonging to Norton sufficient to pay and discharge all claims for work and material furnished in the performance of his contract; and prayed judgment discharging them with costs. Plaintiff demurred to this answer on the ground that it did not state facts sufficient to constitute a defense or counterclaim. The court overruled the demurrer and plaintiff appealed.

Tourne & Davis, for appellant.

The statute under which the village was incorporated directs that such a bond be taken whenever a contract for public work is awarded and that it contain the conditions found in this bond.

Laws 1891, ch. 146, subch. 9, § 4. The wording of the section is identical with that found in the corresponding section of the charter of the city of Duluth. Sp. Laws 1887, ch. 2, subch. 5, § 5, which has been construed by this court. *State Bank of Duluth v. Heney*, 40 Minn. 145.

The answer does not state a demand against the village of West Duluth in its representative capacity as trustee and cannot therefore be pleaded in this action. *Townsend v. Minneapolis C. S. & F. Co.*, 46 Minn. 121.

J. L. Washburn, for respondents.

Having withheld from Norton the money to discharge these claims for labor and material, the plaintiff brings this action to recover from the defendant Norton's bondsmen the amount of one of the claims, although it already holds the money to pay it. We submit that the plaintiff cannot do this; that it cannot retain the money from Norton to pay the claims and also recover the amount again from the bondsmen.

CANTY, J. The complaint in this action alleges that the plaintiff is a municipal corporation organized under Laws 1891, ch. 146; that it entered into a written contract with the defendant Norton for the erection of an addition to its city hall, whereby he agreed to build such addition, and pay for material furnished by any person whatsoever for erecting the same; that at the time of entering into the contract, Norton, as principal, and the other defendants as sureties, made to plaintiff a bond conditioned for the performance of the contract, and to "pay for all labor done and material furnished for or on account of said contract, as aforesaid, as they shall become due;" that in the performance of the contract the Pioneer Fireproof Construction Company so furnished material to Norton, who agreed to pay \$118 therefor, which is unpaid, and demands judgment for that sum. The answer admits the incorporation of plaintiff as alleged, the making of the bond, and, as a necessary implication, the making of the contract between Norton and the village. It then alleges that "said plaintiff has withheld from the said defendant Norton in said contract, and now has in its hands, more than sufficient funds to pay and discharge all just claims of

any persons or corporations furnishing material or doing work thereon, including the claim of the said Pioneer Fireproof Construction Company." To this answer plaintiff demurs, as not stating facts sufficient to constitute a defense, and from the order overruling the demurrer plaintiff appeals.

Laws 1891, ch. 146, subch. 9, § 4, provides that such a contract shall contain a covenant to pay for all labor done and material furnished, and that a bond shall be given as was given in this case; that "said bond shall contain a further condition that he will pay for all labor done and material furnished for or on account of said improvement." These provisions are the same as those in the charter of Duluth construed in *State Bank v. Heney*, 40 Minn. 145, (41 N. W. 411.)

We are of the opinion that the demurrer should have been sustained. The village brought the suit in its mere trust capacity, and, if it recovers the sum sued for, can make no use of it, but pay it to the beneficiary, the construction company. The fact that in its individual capacity the plaintiff has funds in its hands which it might have applied to the payment of this claim makes no difference; it still has a right to act in its trust capacity to compel Norton to perform his contract with the beneficiaries of that trust. Not it, but Norton, agreed to pay these beneficiaries, and, besides, it has a right, under its contract, to hold these funds until Norton has performed his contract, as well where it is for the benefit of such third parties as where it is for the benefit of the plaintiff itself.

The answer does not state facts sufficient to constitute a defense. Order reversed.

Buck, J., absent, took no part.

(Opinion published 58 N. W. 829.)

PIONEER FUEL CO. *vs.* FREDERICK D. HAGER.

Submitted on briefs April 4, 1894. Reversed April 20, 1894.

No. 5626.

Complaint for goods sold and delivered held insufficient.

A complaint which alleges that the defendant is indebted to the plaintiff in a sum named upon an account for goods sold and delivered to him at his request, but not stating by whom the goods were sold, does not state facts sufficient to constitute a cause of action.

Appeal by defendant, Frederick D. Hager, from an order of the District Court of Ramsey County, *William Louis Kelly, J.*, made September 5, 1893, overruling his demurrer to the complaint.

The plaintiff the Pioneer Fuel Company, a corporation, by its complaint alleged that it is incorporated and that defendant is indebted to it in the sum of \$321.23 upon an account for goods sold and delivered him at his instance and request between September 1, 1892, and May 31, 1893; that the same became due and payable on the latter date but that defendant has not paid the same or any part thereof and demanded judgment for the amount with interest and costs. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The court overruled the demurrer, saying: The pleader does not state that the goods were sold and delivered by the plaintiff. Within the spirit of *Solomon v. Vinson*, 31 Minn. 205, the complaint is good. In *Abadie v. Carrillo*, 32 Cal. 172, a similar complaint was upheld, and that case is referred to as authority in *Solomon v. Vinson*, *supra*.

Kueffner, Fauntleroy & Searles, for appellant.

Jones & McMurran and *Lewis E. Jones*, for respondent.

Foerster v. Kirkpatrick, 2 Minn. 210, and *Holgate v. Broome*, 8 Minn. 243, are both overruled by *Solomon v. Vinson*, 31 Minn. 205, and *Guthrie v. Olson*, 32 Minn. 465.

CANTY, J. The complaint in this action alleges "that defendant is indebted to the plaintiff in the sum of \$321.23 upon an account

for goods sold and delivered to him at his instance and request" between certain dates. The defendant demurred on the ground that complaint stated no cause of action. The court below overruled the demurrer, and defendant appealed.

This is an attempt to plead in the common-law form of *indebitatus assumpsit*, but the common-law form required the declaration to state that the defendant is indebted to plaintiff in a sum named for goods sold by the plaintiff to the defendant. This complaint does not allege that the goods were sold by the plaintiff, and such defect was fatal at common law. Chit. Pl. 33, note c (16th Am. Ed.), and *Fenton v. Ellis*, 6 Taunt. 192, cited therein. See, also, *Cathrow v. Hagger*, 8 East, 106. It is true that these were cases where the defect was in the affidavit for the arrest of the defendant, but the principle is the same, and Chitty so regards in citing them as authority as to the effect of a similar defect in the declaration.

"In assumpsit or covenant for the payment of money the defendant may be arrested as a matter of course on an affidavit shortly stating the cause of action." 1 Tidd, Pr. 171. The learned court below states in his memorandum that this complaint is exactly similar to that in *Abadie v. Carrillo*, 32 Cal. 172, which was referred to as authority by this court in *Solomon v. Vinson*, 31 Minn. 205, (17 N. W. 304.) In this he is mistaken, and has undoubtedly been misled by the syllabus in the California case, but the statement of the case shows that the complaint was according to the common-law form.

We are of the opinion that the courts in the code states have sacrificed the principles of code pleading more than they ought to have done in adopting this common-law formula at all, and that we should not outdo the common law itself by reducing the formula still more, and making it still more in conflict with code principles. The complaint must at least be sufficient at common law, which it is not.

The order appealed from is reversed.

Buck, J., absent, took no part.

(Opinion published 58 N. W. 838.)

Application for reargument denied April 24, 1894.

In re GEORGE N. BISSELL, Insolvent.

Submitted on briefs April 16, 1894. Affirmed April 20, 1894.

No. 8805.

Insolvency of a person not a trader, proof of.

Evidence *held* sufficient to justify a finding that a debtor (not a trader) is insolvent, within the meaning of the insolvent law.

Appeal by Alfred E. McCordic, Albert E. Geilfus and the International Bank of West Superior from the judgment of the District Court of St. Louis County, *Charles L. Lewis, J.*, entered November 4, 1893, appointing Frank A. Day receiver of the property of George N. Bissell, insolvent, under Laws 1881, ch. 148, § 2, as amended by Laws 1889, ch. 30, § 2.

George N. Bissell was on October 5, 1893, and long had been a resident of Milford in Otsego County, N. Y., engaged in farming and was not a trader. He bought and owned lands and stocks in St. Louis County in this state and in West Superior, Wisconsin. He was indebted to divers creditors. On September 18, 1893, Alfred E. McCordic commenced an action in the District Court of St. Louis County against him to recover \$12,500 and interest and procured a writ of attachment, and under it the sheriff levied upon Bissell's real estate. On September 19, 1893, Alfred B. Geilfus commenced an action in the same court against Bissell to recover \$2,000 and interest and procured a writ of attachment, and under it the sheriff levied on Bissell's property. On the same day the International Bank of West Superior commenced an action in the same court against Bissell to recover \$2,105.50 and interest and also procured a writ of attachment and under it the sheriff again levied on Bissell's property. Other suits were commenced and attachments issued, and it was shown in evidence that Bissell was owing at least \$75,000 overdue debts. He owed the Lime Rock National Bank of Providence, R. I., \$5,000 and the National Bank of Redemption of Boston, Mass., \$5,000, and on October 5, 1893, these banks presented a petition to the District Court of St. Louis County stating these facts and praying that Bissell be adjudged insolvent and that a receiver be appointed of all his unexempt

property. Bissell for answer made affidavit that he resided at Milford, N. Y., that he was not a trader, that he was worth \$100,000 over and above all indebtedness and that he had unincumbered real estate standing in his own name in St. Louis County, Minn., of the value of about \$200,000 and that his property was amply sufficient to pay all his debts and liabilities. But he did not mention or describe any of the real estate or state the amount of his total indebtedness or the names of any of his creditors. One object of the petitioners was to dissolve the attachments by operation of the statute and prevent the attaching creditors from obtaining a preference. It was stipulated on the hearing November 4, 1893, that the allegations of the petition were true except the statement that Bissell was insolvent. The affidavit of Bissell was received without objection as his evidence in the case.

The court found that Bissell was insolvent, that he had not made an assignment under Laws 1881, ch. 148, § 1, as amended, and it appointed Frank A. Day receiver and directed that he give bond in the sum of \$25,000. The attaching creditors appeal.

McCordic & Crosby, for appellants.

The term "insolvent" is not defined in the insolvency law of Minnesota and the court therefore can very well hold as intimated in *Daniels v. Palmer*, 35 Minn. 347, that the test of insolvency on the part of a merchant or other trader is not applicable to a farmer or other non-trader. Bissell's assets are sufficient to meet his liabilities. The amount and character of his debts have no bearing on the question of his insolvency. His affidavit received in evidence is uncontradicted and shows him to be solvent within the meaning of that term when applied to one not engaged in trade.

Cash, Williams & Chester, for respondents.

The petitioners made out a clear case of insolvency under the law, the debtor was a non-resident, there was nothing in the character of his business transactions in this state to indicate any reason why the strict test of insolvency should not obtain. They had no means of ascertaining the true condition of his financial affairs, but it was evident that other creditors were about to obtain preference on his property to the extent of \$23,000 and more.

The statements in Bissell's affidavit regarding his property and its value are made in the most general terms, no property is specified or described, the valuations given are mere matter of opinion, the statements if untrue would form no basis for a prosecution for perjury.

It cannot be claimed with any degree of fairness that Bissell should be treated as a farmer in this proceeding. It is not claimed that any part of his great indebtedness was incurred in his capacity of farmer, it was entirely outside of his farming business and it is unreasonable to claim that a heavy trader who also runs a little farm for his amusement is entitled to have a farmer's test of insolvency applied to him.

GILFILLAN, C. J. The only question in the case is, was the evidence as to the alleged insolvent's property and debts such as to justify the finding that he was insolvent, within the meaning of the insolvent law? He was not a trader. The evidence on the part of the petitioners was that he was indebted in the amount of \$73,605 principal, most of it notes issued by him, and overdue; that various suits have been commenced against him, and his property attached for \$18,605, in this state; and that various suits have been commenced against him, and his property attached for \$40,000, in the state of Wisconsin. On the part of the alleged insolvent there is the evidence of himself, in which he states the total value of his assets at \$100,000 over and above his debts and liabilities, and that he is the owner of real estate in the county of St. Louis in this state of the value of about \$200,000, without specifying the items of his assets, or the pieces of real estate claimed to be owned by him.

A man's own estimate of the real estate owned by him is, in these times, so unreliable that the court was not bound, in face of the unexplained facts that about \$75,000 overdue debts remain unpaid, and that attachments for about \$60,000 have been levied, and in the absence of any specification of the items of property the insolvent claims to own, to believe that his property when sold to pay his debts would be sufficient to meet them.

There would be few insolvents (not traders) under the insolvent law if such a case as is made by the petitioner is to be deemed

overcome by so vague and general statements as those with which the insolvent attempts to meet it.

Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 828.)

CARL H. DOUGLAS *vs.* NATHANIEL G. LEIGHTON *et al.*

Submitted on briefs April 18, 1894. Reversed April 20, 1894.

No. 8723.

Writing to refresh recollection of witness.

It does not seem necessary that a writing used by a witness to refresh his memory should have been made by the witness himself, nor that it should be an original writing, provided, after inspecting it, the witness can speak of the facts of his own recollection; but a witness can no more be permitted to give evidence of his inference from what a third person has written than from what a third person has said.

Appeal by defendants, Nathaniel G. Leighton and others, partners, from an order of the District Court of Hennepin County, Henry G. Hicks, J., made January 6, 1894, denying their motion for a new trial.

Action to recover of Nathaniel G. Leighton and others, partners, a balance of \$1,531.57 for saw-logs sold and delivered. On February 19, 1886, plaintiff contracted with defendants to cut and bank about 2,000,000 feet of white pine saw-logs during that winter on the Little Prairie River in Carlton County. They were to be there scaled by the Surveyor General of that lumber district. This scaling was to be taken and accepted by the parties as the true and final measurement of the logs. Plaintiff was then to float or "drive" the logs down the stream in the spring freshets, and deliver them in the boom at Minneapolis, and was to be paid therefor \$7 per thousand feet. The logs were so piled on the banks and in the stream that it was impracticable for the Surveyor to inspect and measure some of them, and those he estimated or averaged. Defendants knowing this, accepted and sawed

v.57M.—6

the logs, sold the lumber, and paid plaintiff on account \$11,145.85.

The controversy was as to the quantity of logs delivered: The issues were first tried October 31, 1892. By direction of the Judge defendants had a verdict. On appeal a new trial was granted. 53 Minn. 176. A second trial was had October 24, 1893. It was shown in evidence that one of plaintiff's men stationed at the bank of the stream kept an account on a tally-board of the number of logs delivered there each day and that plaintiff's foreman copied the number each night into his book. Plaintiff afterwards on May 8, 1886, copied from this book into his cash book the number of logs delivered each day. The tally boards were not preserved. The foreman's book was accidentally destroyed by fire in 1890. At the second trial plaintiff was a witness and was handed his cash book and testified that the account of logs therein was a correct transcript from the foreman's book and was then permitted to state that the burned book showed that 9,128 logs had been unloaded on the bank. The defendants objected to this evidence as incompetent but it was received and they excepted. Plaintiff had a verdict for \$693.57. Defendants moved for a new trial for errors in law occurring at the trial and excepted to by them. Being refused they appeal.

Rea, Hubachek & Healy, for appellants, cited *Paine v. Sherwood*, 21 Minn. 225; *Creswell v. Slack*, 68 Ia. 110.

Chas. P. Barker, for respondent.

In the case at bar the cash book was not received in evidence but was offered to the witness to refresh his recollection. The witness testified from recollection. The book of original entry was shown to have been burned. Such an offer is addressed to the discretion of the trial court and this court will not interfere unless it clearly appears to have been prejudicial. *Madigan v. De Graff*, 17 Minn. 52; *Chute v. State*, 19 Minn. 271; *Johnson v. Coles*, 21 Minn. 108; *Groff v. Ramsey*, 19 Minn. 44; *Estes v. Farnham*, 11 Minn. 423; *Thayer v. Barney*, 12 Minn. 502; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492.

COLLINS, J. The nature of this controversy will be seen upon an examination of the opinion rendered on a former appeal. 53

Minn. 176, (54 N. W. 1053.) At the second trial it was shown by one of plaintiff's witnesses (his foreman) that, as the logs were unloaded at the bank or landing, one of the men kept an account of the number on a tally board, and that, after each day's hauling was completed, the foreman copied the number appearing on the board into a book. These numbers were footed up so that each month's work appeared by itself, and at the close of the season, about April 1, 1886, the book was delivered by the foreman to the plaintiff. The latter soon after copied these footings (and nothing else, as we understand it, although the testimony is not very clear) onto a page in his cashbook. In 1890 the original book used by the foreman when he transcribed from the tally board was destroyed by fire. This being shown upon the trial, the plaintiff, who did not claim to have any personal knowledge of the number of logs as counted and kept on the tally board, or of the number actually unloaded at the bank, was allowed to use the page from his cashbook, before mentioned, to refresh his memory, and then to state what the footings were in the original book, and also the number of logs which had been delivered.

Briefly stated, the plaintiff was allowed to refresh his memory for the purpose of testifying by the examination of figures which he had transcribed from a book into which his foreman, who had no personal knowledge of the matter, had copied what appeared upon a tally board kept by still another of plaintiff's employés. We quite agree with counsel for respondent that much discretion must rest with the trial judge when permitting a memorandum to be used for the purpose of refreshing the memory of a witness, but the ruling of the trial court now before us cannot be sustained on that ground.

The rules under which a witness may be permitted to refresh his memory by the use of writings are fully stated in 1 Greenl. Ev. §§ 436, 437. According to the authorities, it does not seem to be necessary that the writing used should have been made by the witness himself, nor that it should be an original writing, provided, after inspecting it, he can speak of the facts from his own recollection. Here the witness had no knowledge, and consequently no recollection, of the number of logs unloaded at the landing, except as he had been told or informed by his foreman,

who also was unable to speak of his own knowledge or recollection. The testimony of the witness, so far as it was founded upon the copy made by him, or so far as it would have had a foundation if he had used the book kept by his foreman, was but hearsay, and a witness can no more be permitted to give evidence of his inference from what a third person has written than from what a third person has said. See *Eder v. Reilly*, 48 Minn. 437, (51 N. W. 226.)

We think the admission of this testimony was prejudicial to the defendant, and that a new trial must be had.

Order reversed.

BUCK and CANTY, JJ., took no part.

(Opinion published 58 N. W. 827.)

THOMAS B. McMAHAN *vs.* JOHN P. LUNDIN.

Argued April 11, 1894. Affirmed April 20, 1894.

No. 8630.

Priority of lien for seed over mortgage on the crop.

A lien arising upon a crop by virtue of a seed-grain note, executed and filed in accordance with the terms of 1878 G. S. ch. 39, §§ 21, 22, has priority over a lien upon the same crop acquired by means of a previously executed and filed chattel mortgage.

Appeal by defendant, John P. Landin, from a judgment of the District Court of Marshall County, *Frank Ives, J.*, entered August 24, 1893, against him for \$198.43.

On January 16, 1892, Engbregt N. Egeland was indebted to defendant in the sum of \$208.70. To secure its payment he on that day gave defendant a mortgage upon sixty-five acres of spring wheat which he intended to sow on his farm the next spring. This mortgage was filed February 4, 1892, in the town clerk's office. On March 22, 1892, Charles Johnson sold and delivered to Egeland one hundred and forty five bushels of spring wheat at seventy five cents

per bushel and took his note therefor with ten per cent interest due November 15, 1892. The note contained a statement that it was given for the price of 145 bushels of seed wheat to be sown on his farm. This note was next day filed in the town clerk's office. The wheat was sown and a crop raised, harvested and threshed. It exceeded 800 bushels but Egeland disposed of most of it and left the state. On October 20, 1892, defendant took 346 bushels of the crop under his mortgage and sold it and applied the proceeds. Johnson sold and assigned his note and lien to the plaintiff, Thomas B. McMahan, who made demand of defendant for the wheat he took, and being refused brought this action March 8, 1893, for the conversion and claimed as damages the amount due on the seed-grain note. Defendant answered claiming title under his mortgage and contending it to be the paramount lien on the crop.

A jury was waived and the cause tried August 2, 1893. Findings were made and judgment ordered for plaintiff for the amount due on the seed-grain note with costs. Judgment was so entered and defendant appeals.

Horace W. Brown and Brown & Bayrell, for appellant.

The law creating a seed-grain lien so far as it attempts to give preference over prior incumbrances is unconstitutional and void. *Meyer v. Berlandi*, 39 Minn. 438; *Yeatman v. Foster County*, 2 N. Dak. 421. A valid mortgage can be obtained upon a growing crop prior to its being sown.

Brown & Carr, for respondent.

Plaintiff's lien under his seed-grain note is superior to the lien of defendant under his mortgage. 1878 G. S. ch. 39, § 22, is not a law impairing the obligation of contracts. A mortgage in advance on a crop to be sown and raised on the land of the mortgagor is an executory agreement to mortgage and will only take effect when the crop is sown. *Ludlum v. Rothschild*, 41 Minn. 218; *Walter A. Wood M. & R. M. Co. v. Minneapolis & N. E. Co.*, 48 Minn. 404; *Joelyn v. Smith*, 2 N. Dak. 53.

Defendant having taken his mortgage while the seed-grain lien statute was in force will be presumed to have acted with reference to it. In legal contemplation he consented that the mortgagor in-

cumber the crop with a lien for seed grain furnished in good faith by a third party. This seed was necessary to raise such crop and the law implies consent on the part of the mortgagee to have the crop incumbered with a prior lien for seed.

COLLINS, J. By 1878 G. S. ch. 39, § 22, it is enacted that from the time of filing in the proper office of a seed grain note, executed in accordance with section 21 of the same chapter, the party furnishing the seed grain for which the note is given, or his assigns, shall have a valid first lien or claim upon the crop grown from such seed. The statute is clear and plain, and its policy is wise and just. It must be construed exactly as it reads. He who in good faith sells and furnishes seed from which a crop may be raised, and properly files a note taken for the same, should be and is entitled to priority of lien over all other persons.

We see nothing in the suggestion that the obligation of a contract is impaired if it be declared that a lien arising by virtue of a seed-grain note has priority over a lien upon the same property acquired by means of the provisions of a previously executed chattel mortgage. The power of the legislature to provide for first liens of this character ought not to be doubted.

Again, a mortgage upon a crop not yet planted or sown attaches only to such interest as the mortgagor has in the crop when it comes into being. *Simmons v. Anderson*, 44 Minn. 487, (47 N. W. 52.)

Judgment affirmed.

BUCK, J., absent, sick, did not sit.

(Opinion published 58 N. W. 897.)

ST. PAUL & M. TRUST CO. *vs.* JAMES LECK *et al.*

Argued April 10, 1894. Reversed April 30, 1894.

No. 8628.

57	87
65	498
67	174
57	87
71	396

Insolvency as a ground for equitable set-off.

The insolvency of a party against whom a set-off is claimed affords sufficient ground for the application of the doctrine of equitable set-off, and the equitable powers of the court in such cases are not impaired by the fact that an assignment for the benefit of creditors has been made by the insolvent under the statutes of this state.

Appeal by defendants, James Leck and Angus McLeod, from an order of the District Court of Hennepin County, *Robert D. Russell, J.*, made August 31, 1893, sustaining a demurrer to their answer.

On February 9, 1893, one George McLeod deposited with the Farmers and Merchants State Bank of Minneapolis \$530 and took therefor its certificate in and by which the bank agreed to repay the money to his order twelve months thereafter with six per cent interest. Prior to April 1, 1893, George McLeod sold and indorsed this certificate to the defendant Angus McLeod. On April 29, 1893, Angus McLeod made his promissory note to Leck & McLeod for \$600 and interest at ten per cent a year due sixty days thereafter. It was indorsed by that firm and on that day discounted by this bank.

On June 20, 1893, the bank being insolvent, made an assignment of its property to the plaintiff, the St. Paul and Minneapolis Trust Company, in trust for its creditors under Laws 1881, ch. 148, as amended by Laws 1889, ch. 30. On July 25, 1893, the plaintiff brought this action upon the note against the maker and Leck the indorsers. They answered stating that defendant Angus McLeod held and owned the certificate of deposit, that the bank was utterly insolvent and that its assets were not sufficient to pay five per cent. of its debts. They prayed judgment that the certificate for \$530 and accrued interest although not due be setoff against the note, and for such other and further relief as should be just and equitable. The plaintiff demurred to this answer on the ground that it did

not state facts sufficient to constitute a counterclaim or defense. On argument the trial court sustained the demurrer with \$10 costs, saying:

If the only parties interested were the bank and the defendant McLeod it might be proper to depart from the legal and apply the equitable principle and allow the setoff, but here the rights of other creditors have intervened. If on the day before its assignment the bank had said to McLeod, "We are insolvent and are about to make an assignment, bring in and surrender your certificate not yet due and we will credit the amount on your note," and he had assented and credit had been made, the transaction could have been set aside as a preference. *Tripp v. Northwestern Nat. Bank*, 45 Minn. 383. If this would have been a preference surely a court of equity cannot interpose and by maturing a certificate by its terms not due, permit a preference to the debtor holding the certificate, by suffering it to be applied on his note held by the bank. By so doing the court would create a preference after the assignment which under the terms of the statute could not stand if made before the assignment. *Balch v. Wilson*, 25 Minn. 299; *Fera v. Wickham*, 135 N. Y. 223; *Laybourn v. Seymour*, 53 Minn. 105. There are decisions under the National Bankrupt Law which appear to hold a contrary doctrine to this, but they are governed by a provision of that statute, "that in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated and one debt setoff against the other and the balance only shall be allowed or paid." There is no such provision in the assignment law of this state. The case of *Nashville Trust Company v. Fourth Nat. Bank*, 91 Tenn. 336, is not in harmony with this doctrine, but the reasoning upon which that decision rests is inconsistent with the reasoning in the cases cited above, and is not as logical as that in *Fera v. Wickham*, *supra*. For these reasons the demurrer is sustained.

Gilfillan, Belden & Willard, for appellants.

This question has not been decided adversely to the appellants in this court. *Tripp v. Northwestern Nat. Bank*, 45 Minn. 383; *Martin v. Pillsbury*, 23 Minn. 175; *Laybourn v. Seymour*, 53 Minn.

105; *Balch v. Wilson*, 25 Minn. 299. The act of 1881 is a bankrupt law. *Kinney v. Sharvey*, 48 Minn. 93; *Simon v. Mann*, 33 Minn. 412. Bankruptcy for the purpose of the settlement of the bankrupt's affairs matures all claims against him. *Citizens' Nat. Bank v. Minge*, 49 Minn. 454; *In re Minneapolis Mut. F. Ins. Co.*, 49 Minn. 291.

A person sued by an insolvent has a right in equity to setoff a claim against the insolvent not yet due. This equity cannot be taken away by an assignment. *Barbour v. National Exch. Bank*, 50 Ohio St. 90; *Merwin v. Austin*, 58 Conn. 22. To say that the allowance of the setoff would create a preference contrary to the provisions of our insolvent law, and therefore the appellant's contention must be wrong, is to beg the question. That is the very thing to be decided, whether a preference is created. *Drake v. Rollo*, 3 Biss. 273; *Scott v. Armstrong*, 146 U. S. 499.

If the law in the United States courts is in favor of the appellants this court will follow it. *National Bank of Commerce v. Chicago, B. & N. R. Co.*, 44 Minn. 224; *Joslyn v. St. Paul Distilling Co.*, 44 Minn. 183; *Rosemond v. Graham*, 54 Minn. 323. Upon this point of equitable setoff the federal courts do not follow the state practice and procedure. *Scott v. Armstrong*, 146 U. S. 499; *Carr v. Hamilton*, 129 U. S. 252; *Scammon v. Kimball*, 92 U. S. 362; *Schuler v. Israel*, 120 U. S. 506.

It is no answer to these cases to say that the provisions of the bankrupt law allowed a setoff in cases not covered by the common law. Speaking of the bankrupt act (U. S. R. S. § 5073) the court said: This section was not intended to enlarge the doctrine of setoff, or to enable a party to make a setoff in cases where the principles of legal or equitable setoff did not previously authorize it. *Sawyer v. Hoag*, 17 Wall. 610; *Yardley v. Clothier*, 49 Fed. Rep. 337; *Wagoner et al., Receivers v. Paterson Gas Light Co.*, 23 N. J. Law, 233.

The cases on this question in other jurisdictions are conflicting. Most of those decided prior to 1892 are examined and considered in a Tennessee case decided in that year. The argument of the court in that case the appellants adopt as a part of their argument

here. *Nashville Trust Co. v. Fourth Nat. Bank*, 91 Tenn. 336; *Kentucky Flour Co.'s Assignee v. Merchants Nat. Bank*, 90 Ky. 225; *Barbour v. Nat. Exch. Bank*, 50 Ohio St. 90; *Hughitt v. Hayes*, 136 N. Y. 163.

The appellant McLeod being the principal debtor and the appellant Leck a mere surety for him, the setoff can be allowed although the certificate was owned by McLeod alone. *Becker v. Northway*, 44 Minn. 61.

H. D. Stocker, for respondent.

It is not claimed that the right of setoff exists at law, and it would be a violation of equity to compel a setoff after the rights of third parties have intervened. There are no authorities to sustain appellant's position under similar facts. It would not only give Angus McLeod a preference over other creditors but it would deprive the creditors of their just claim against James Leck one of the parties to this note. *Barnstable Sav. Bank v. Snow*, 128 Mass. 512. If the Bank, as suggested by the court below, had permitted this setoff to be made after it was known to be insolvent, the plaintiff could have collected the money represented by this note upon the ground that defendants had received a preference contrary to law. *Tripp v. Northwestern Nat. Bank*, 45 Minn. 383.

If the bank could not have made the setoff after insolvency then the assignee certainly could not permit it to be done. This court will not do that which neither the bank nor the assignee could legally do.

If the right of setoff did not exist at the time of the assignment, it cannot arise afterwards. The equities of the creditors of this insolvent bank are superior to any Angus McLeod can possess. *Bosler v. Exchange Bank*, 4 Pa. St. 32; *Appeal of F. & M. Bank*, 48 Pa. St. 57; *Stevens v. Schuchmann*, 32 Mo. App. 333; *Osborne v. Byrne*, 43 Conn. 155; *Lockwood v. Beckwith*, 6 Mich. 168; *Hannon v. Williams*, 34 N. J. Eq. 255; *Spaulding v. Backus*, 122 Mass. 553.

The decisions of New York have been uniform in sustaining the position taken by the plaintiff in this case, and we will content ourselves by citing *Fera v. Wickham*, 135 N. Y. 223.

COLLINS, J. An examination of the adjudicated cases on the question now before us will disclose that the positions assumed by the counsel for the respective parties to this controversy are well supported by the authorities, and that any attempt to reconcile the squarely-conflicting views found in the many opinions would prove futile. Evidently it has been regarded as an open question in this state, although the principle involved has received some attention in *Balch v. Wilson*, 25 Minn. 299; *Tripp v. Northwestern Nat. Bank*, 45 Minn. 383, (48 N. W. 4;) and recently in *Laybourn v. Seymour*, 53 Minn. 105, (54 N. W. 941.)

That the insolvency of a party against whom a set-off is claimed is a sufficient ground for the exercise of the jurisdiction of a court of equity in allowing a set-off in cases not provided for by law, or, in other words, that insolvency has long been recognized as a distinct equitable ground for set-off, cannot well be disputed. Some of the cases supporting this doctrine are cited in *Waterman, Set-Off*, §§ 431, 432. See, also, *Kentucky Flour Co.'s Assignee v. Merchants' Nat. Bank*, 90 Ky. 225, (13 S. W. 910,) and cases hereinafter mentioned. From these authorities there can be little or no controversy over the proposition that had the bank itself while insolvent, and prior to an assignment, brought an action upon the note in question, defendant McLeod could have invoked the power of the court in his behalf, and could have been allowed to interpose his equitable set-off arising out of the certificate of deposit, although it had not then matured. So that the prominent inquiry now is whether this equitable power of the court was impaired by the assignment to plaintiff under the statute of 1881 a few days before the note became due and several months prior to the maturity of the certificate.

Upon principle, it is difficult to see why a set-off which a debtor might have utilized in an action brought against him by an insolvent creditor cannot be made available when the action is brought by an assignee. To determine that it cannot, it must be held, contrary to the general rule, that, by reason of the assignment, the relations between the parties have been radically changed. Just how this change is brought about is not clearly pointed out in any of the cases cited by respondent's counsel, although it is said in the case mainly relied upon—*Fera v. Wick-*

ham, 135 N. Y. 223, (31 N. E. 1028)—that, before the assignment, an equitable adjustment by set-off may be made without interfering with the equities of others, while immediately upon the passing of the estate to an assignee the formerly existing and natural equity disappears in superior equities resting in the general body of creditors; the latter are then interested, says the court, in having equality of distribution.

In line with this reasoning, the counsel for respondent in the case at bar argues that, if the defendant McLeod can be allowed to set off the certificate to the amount of his note, he thereby gains the preference over other creditors forbidden by our insolvency law. One answer to this line of argument is that, whenever a debtor is insolvent, all of his creditors are interested in the equality of distribution referred to. The interest in having the estate of an insolvent ratably distributed among all of his creditors arises out of the fact of his insolvency, and not by the assignment. If the general body have superior equities as to the property and its distribution over the equitable rights of one of their number, they must antedate and have become vested before the assignment.

It seems to us that any line of reasoning based upon the proposition that these superior equities are not brought into existence until the assignment is made, and then suddenly come to life, while at the same time, all as if by the wand of the magician, the former and natural equity of the single creditor as suddenly disappears, is unsound. We are convinced that the better rule is that an equitable set-off which the debtor of an insolvent has at the time the latter stops payment is not affected or altered by an assignment. This statement is well supported by authorities, some from jurisdictions governed by statutory provisions similar to our own. *Schuler v. Israel*, 120 U. S. 506, (7 Sup. Ct. 648;) *Carr v. Hamilton*, 129 U. S. 252, (9 Sup. Ct. 295;) *Scott v. Armstrong*, 146 U. S. 499, (13 Sup. Ct. 148;) *Merwin v. Austin*, 58 Conn. 22, (18 Atl. 1029;) *Wagoner et al., Receivers, v. Paterson Gas Light Co.*, 23 N. J. Law, 283; *Nashville T. Co. v. Fourth Nat. Bank*, 91 Tenn. 336, (18 S. W. 822;) *Barbour v. National Exchange Bank*, 50 Ohio St. 90, (33 N. E. 542.)

The defendant McLeod being the principal debtor, and Leck an indorser simply, the set-off can be allowed, although McLeod alone

owned the certificate. *Becker v. Northway*, 44 Minn. 61, (46 N. W. 210.)

Order reversed.

BUCK, J., absent, sick, took no part in this case.

(Opinion published 58 N. W. 826.)

REGISTER PRINTING Co. vs. JOHN W. WILLIS *et al.*

Submitted on briefs April 16, 1894. Affirmed April 20, 1894.

No. 8584.

Proof secundum allegata.

In an action for work and labor upon a *quantum meruit* the defendant cannot, under a mere denial of the allegations of the complaint, avail himself of an express contract as to the price as a defense to the action.

Appeal by defendants, John W. Willis and George M. Nelson, from an order of the Municipal Court of the City of St. Paul, *H. W. Cory, J.*, made August 9, 1893, denying their motion for a new trial.

The plaintiff, the Register Printing Company of Glencoe brought this action in the Municipal Court of St. Paul and for complaint alleged that on June 1, 1892, it was a corporation and at defendants' request furnished materials and printed for them seventeen copies of a paper book of 343 pages in *Stensjaard v. St. Paul Real Estate Title Ins. Co.* (50 Minn. 429,) that the work and material were reasonably worth \$343, that only \$75 had been paid thereon and demanded judgment for the balance. For answer defendants denied that the plaintiff was a corporation and denied that they owed plaintiff anything and then denied each and every other allegation in the complaint. A jury was waived. The plaintiff gave evidence tending to support the issues on its part. Defendants on cross examination of plaintiff's witness offered to show a special contract between plaintiff and George M. Nelson that plaintiff was to receive but fifty cents a page in case defendants did not succeed on the appeal and seventy five cents if they did. Plaintiff objected but was overruled and the evidence was received. Defendants then

57	98
62	131

moved the court to dismiss the action on the ground that the complaint is upon a *quantum meruit*, but the evidence shows that the work was done and material furnished under an express contract. The court denied the motion, made findings and ordered judgment for plaintiff for \$98. Defendants moved for a new trial. Being denied they appeal.

Thos. C. Fitzpatrick and Thos. J. McDermott, for appellants.

The burden was on the plaintiff to prove its cause of action as alleged in the complaint. A different and distinct cause of action could not be properly litigated. The complaint was for the reasonable value of such work, the proofs showed an express contract to furnish a specified number of books for an agreed price. The court erred in refusing defendants' motion to dismiss. *Schroeder v. Capehart*, 49 Minn. 525; *Benedict v. Bray*, 2 Cal. 251; *Eilert v. Oshkosh*, 14 Wis. 586; *Lamke v. Daegling*, 52 Wis. 498; *Harris v. Rayner*, 8 Pick. 541; *Stratton v. Hill*, 134 Mass. 27; *Cunningham v. Hobart*, 7 Gray, 423; *Upton v. Winchester*, 106 Mass. 330; *Looney v. Looney*, 116 Mass. 283; *Hart v. Tyler*, 15 Pick. 171; *Fitzgerald v. Jordan*, 93 Mass. 128; *Wernli v. Collins*, 87 Ia. 548; *Southwick v. First Nat. Bank*, 84 N. Y. 420.

The rule of law as to variance between the pleadings and proof is well settled in our own courts. *Helper v. Alden*, 3 Minn. 332; *Ward v. Haws*, 5 Minn. 440; *Cummings v. Long*, 25 Minn. 337; *Cowles v. Warner*, 22 Minn. 449; *Desnoyer v. L'Hereux*, 1 Minn. 17; *Dennis v. Spencer*, 45 Minn. 250.

There is a total failure of proof of plaintiff's case as alleged and the court erred in finding the allegations of the complaint true. *Cremer v. Miller*, 56 Minn. 52.

C. R. Woods, for respondent.

There was proof sufficient to sustain the complaint on a *quantum meruit*. The damages given are within the proof as to value. The court erred in receiving evidence of a special contract as no such contract was alleged. That evidence should be disregarded on this appeal. It is not properly in the case. It was objected to and it does not support any defense stated in the answer. That

evidence being out of the case the order should be affirmed. The plaintiff did not recover upon the special contract. The defendants' authorities are good law. They show that the answer is insufficient to support the defense relied on, and plaintiff adopts them as its brief in this case. The acts of Nelson, one of the partners of the firm, made or done with reference to the firm's business, are sufficient to bind the firm. *Slipp v. Hartley*, 50 Minn. 118; *National Bank of Commerce v. Meader*, 40 Minn. 325.

MITCHELL, J. This was an action to recover for labor and services alleged to have been performed by plaintiff for defendants at their instance and request, and to be of the reasonable value of \$345, of which only \$75 had been paid. The answer was, in effect, a general denial.

The evidence was sufficient to justify a finding that the services sued for were performed for defendants as alleged. The evidence was undisputed that such services consisted of printing a "paper book" of 345 pages, and were reasonably worth \$1 per page, or \$345; but it also appeared on cross-examination of plaintiff's witnesses that the work was done under an express contract that plaintiff was to receive seventy five cents per page if defendants won the suit, but only fifty cents per page if they lost it. It does not appear whether the suit was lost or won, but, assuming that it was lost, the contract price would be \$172.50, leaving a balance due plaintiff of \$97.50. The court found that the services were reasonably worth \$173, and ordered judgment in plaintiff's favor for \$98.

Disregarding the trifling discrepancy of fifty cents it will be observed that the amount of the recovery was the amount due plaintiff on the special contract, and much less than the reasonable value of the services. The defense that the work was done under an express contract as to price was not open to defendants under the general denial. That was a matter which should have been set up in the answer. Under a general denial the defendant may prove anything which tends to disprove the facts upon which the plaintiff relies to recover. That there was an express contract as to price would not tend to disprove any of the allegations of the complaint. *Lautenschlager v. Hunter*, 22 Minn. 267.

Defendants, by their answer, elected to rest their defense upon

an issue as to the reasonable value of the services, and must abide by it. Whether plaintiff was a corporation or a mere copartnership was not material.

Order affirmed.

(Opinion published 58 N. W. 825.)

ELIZABETH C. TAYLOR *vs.* SABANNAH HESS.

Submitted on briefs April 4, 1894. Reversed April 30, 1894.

No. 8871.

Evidence, declarations of a vendor.

Rule applied that declarations in disparagement of the title of the declarant, made during the continuance of his title, or while the property was under his control, are admissible as original evidence against those in privity with him.

Appeal by defendant, Sabannah Hess, from a judgment of the District Court of Morrison County, *L. L. Baxter, J.*, entered against her May 27, 1893, for \$596.67 in favor of plaintiff, Elizabeth C. Taylor, as administratrix of the estate of her deceased husband, James H. Taylor.

Coppernoll & Willson, and *B. F. Hartshorn*, for appellant.

On this trial defendant offered to prove the declarations of William Newman concerning his ownership of the notes in suit made by him after the time when Elizabeth C. Taylor claimed to have sold the notes to him, and when he had the notes in his possession. She offered to prove by the witness that in August, 1888, Newman stated that he did not own these notes; that Mrs. Taylor wanted him to buy them but he would not have anything to do with them, and did not want to get into any trouble. This evidence was excluded and defendant excepted.

Whether or not William Newman was a *bona fide* purchaser of the notes before maturity for a valuable consideration in good faith and whether or not the deceased, James H. Taylor, could suc-

ceed to his rights, the title of plaintiff as administratrix of her husband's estate could not be better or of a different character than her husband's title. As Newman's declarations concerning his ownership of the notes go to his own title they go to the title of plaintiff, she being a representative of Taylor his devisee, and as the question of title is involved, the declarations of Newman as to his ownership of the notes are material and relevant, not incompetent as hearsay, and should have been received in evidence. *Wilson v. Patrick*, 84 Ia. 362; *Fellows v. Smith*, 130 Mass. 378; *Platner v. Platner*, 78 N. Y. 90; *Pickering v. Reynolds*, 119 Mass. 113; *City of Elgin v. Beckwith*, 119 Ill. 367; *Clouser v. Ruckman*, 104 Ind. 588; *Baker v. Taylor*, 54 Minn. 71; *Hosford v. Rowe*, 41 Minn. 245.

A. P. Blanchard and *J. N. True*, for respondent.

The court was correct in not permitting the witness Tuttle to testify to conversation in which the deceased Newman while in possession of these notes said he did not own them. Had this been error, it would have been error without prejudice. Defendant claims that these statements were against the interest of the party making them at the time when they were made. There was nothing in the evidence or the offer to show this. The witness Tuttle was a stranger who had no interest in the matter. It could not injure Newman to say to Tuttle that he was not owner of these notes; in fact, he might have had a direct reason for claiming that he did not own them. Men often represent themselves to be poorer than they are, to avoid the payment of taxes under the belief that it is policy to do so. No evidence was introduced or statement made showing the circumstances under which Newman made this remark. Tuttle might have been trying to obtain a subscription or to collect taxes and the making of such a statement might have been directly within the interest of Mr. Newman.

MITCHELL, J. The uncontroverted facts are that the plaintiff, Elizabeth C. Taylor, being the owner of certain real estate in her own right, contracted to sell it to defendant; that for the purchase money the latter executed to the former seven negotiable promissory notes for the aggregate amount of \$650, and at the
v.57m.—7

same time, and as part of the same transaction, the plaintiff and her husband, James H. Taylor, executed to defendant their joint bond, in which, after reciting the execution of these notes, they obligated themselves to convey the land to defendant by warranty deed upon payment of half (\$325) the purchase money, and the execution back of a mortgage on the premises for the other half. This bond was placed on record, and, pursuant to its terms, defendant went into, and still remains in, possession of the land. She paid Mrs. Taylor the first of these notes (\$50) and one year's interest on the others. This is all that has been paid on the purchase money. Subsequently one Hunter obtained and docketed a judgment against Mrs. Taylor, upon which execution was issued, and the land sold as her property, and bid in by Simeon Hess, defendant's husband, for \$50. The time for redemption from this sale has expired, and no redemption has been made, so that the legal title to the land is now in Simeon Hess, defendant's husband. No deed has ever been executed or tendered to defendant.

This action is brought on five of these purchase-money notes, amounting to \$500 and interest. The last, or seventh, of these notes (for \$100) was not yet due when this action was commenced. Thus far the facts are undisputed.

The plaintiff brings this action not in her own right, but as administratrix of the estate of James H. Taylor, her deceased husband. In her complaint she claims title to the notes by an alleged transfer of the same by herself individually to one Newman, before maturity, and for a valuable consideration, and a bequest of the same by Newman (who has died testate) to her decedent, James H. Taylor. In her answer, defendant alleges that the alleged transfer of the notes by plaintiff to Newman, if any, was made after the sale of the land on the Hunter judgment, and without consideration, and was merely colorable, to enable the plaintiff to collect the notes notwithstanding the failure of her title to the land by reason of its sale on this judgment. These were really the only material facts put in issue or controverted on the trial.

It is not necessary to consider what, if any, beneficial interest in the land Simeon Hess acquired by virtue of his purchase on the execution sale. It is certain that he obtained at least the bare legal title.

By lapse of time, one-half and more of the purchase money had become due, so that the agreement of defendant to pay and the agreement of Mrs. Taylor to convey had become dependent. But Elizabeth C. Taylor can make no conveyance, as the legal title to the land has passed out of her, and it can make no difference whether this has resulted from her voluntary act or from her permitting herself to be divested of the title by a sale on this judgment. But Simeon Hess, the husband, is not a party to this action, and will not be bound by the result. Hence, if his wife, the defendant, be compelled to pay in this action, she may be compelled to pay again to him, in order to obtain a conveyance of the land, or at least compelled to bring a suit against him to compel a conveyance.

Under the old practice, these facts would have authorized an application to a court of chancery for relief against an action at law on the notes; and under the present practice the same facts may be set up as an equitable defense, because they constitute a good reason why plaintiff ought not to recover in this action.

Hence, whatever she might do in an action to which Simeon Hess was a party, and in which the right of defendant to conveyance could be protected, the plaintiff cannot recover in this action unless the estate of her decedent James H. Taylor stands in the position of a *bona fide* indorsee for value before maturity; and, laying entirely to one side any questions arising out of James H. Taylor's liability on the bond to plaintiff, it is clear that his estate cannot stand in any better position than Newman did, because he, Taylor, was not a purchaser of the paper for value.

As bearing on this issue, defendant offered to prove by competent witnesses that after the time plaintiff claims to have sold these notes to Newman, and while he still had them in his possession, he stated that they did not belong to him; the plaintiff wanted to sell them to him, but that he would have nothing to do with them, as he did not want any trouble about them. These declarations of Newman were excluded by the court as hearsay evidence. This was error. According to a very familiar rule, they were, under these facts, admissible against plaintiff, who, as administratrix, is in privity with Newman, as declarations in disparagement of his title. 1 Greenl. Ev. § 109 *et seq.*; *Hosford v. Rowe*,

41 Minn. 245, (43 N. W. 180;) *Fellows v. Smith*, 130 Mass. 378. For this error a new trial must be had.

Much is said about defendant's unconscionable scheme "to pay large debts with small means." Such considerations cannot affect the legal questions involved, but it may not be out of place to suggest that some things in the record are at least suggestive of a suspicion that honors may be easy between the parties. Some things indicate that defendant and her husband may be in collusion to avoid paying the full purchase price of the land to plaintiff, while other things might look as if Mrs. Taylor had been contriving to avoid the payment of the judgment against her. Certain it is that the parties have engaged in expensive and complicated litigation, which either one could have avoided at small expense.

Judgment reversed.

(Opinion published 58 N. W. 824.)

ALECK E. JOHNSON *vs.* HELEN M. JOHNSON.

Submitted on briefs April 4, 1894. Affirmed April 20, 1894.

No. 8684.

Assignment of error abandoned.

An assignment of error not included in the points relied on will be deemed abandoned.

Res judicata.

A domestic judgment on the merits is conclusive in a subsequent action between the same parties upon all issues, principal or subordinate, which were actually tried and directly passed upon in the first action.

Appeal by defendant Helen M. Johnson, from a judgment of the Municipal Court of the city of St. Paul, *John Twoky, Jr., J.*, entered December 9, 1893.

The plaintiff, Aleck E. Johnson, was married to defendant July 18, 1876, at Lake City, Minnesota. He owned lot three (3) and

the west half of lot two (2) in block thirty (30) of Rice & Irvine's Addition to St. Paul, and he and wife lived in the house thereon up to 1890. It was their homestead. In that year he removed to Chicago, Ill., but his wife and only child, Florence May Johnson, remained in St. Paul and continued to occupy the house. On July 12, 1892, he procured a judgment of divorce *a mensa et thoro* from his wife in the Circuit Court of Cook County, Ill. on the ground of her desertion. Process was not personally served upon her in Illinois. She did not appear in that action and the judgment was entered *ex parte* on default of answer. The wife, Helen M. Johnson, soon after commenced an action against her husband in the District Court of Ramsey County for divorce and alimony and the custody of her child. He appeared and answered and on May 12, 1893, judgment was entered therein, wherein it was ordered, adjudged and decreed that the bonds of matrimony between the parties were dissolved by the decree of the Circuit Court of Illinois; that the wife have the custody of the child during minority and that she recover of her husband \$35,000 alimony and have the household goods and other personal property in the St. Paul house. Said allowance was to be in lieu of all her rights and interest in his estate.

He paid the \$35,000 and gave her a lease of the house and lots terminable upon thirty days' notice in writing. On September 8, 1893, he gave her such notice, and on October 13, 1893, he gave her a further notice that if she remained she must pay \$75 a month rent. On November 15, 1893, he made complaint in the Municipal Court against her as an overholding tenant. She answered that the house was the homestead of the parties prior to 1890, that he deserted her and went to Chicago, Ill. leaving her residing in it, that she and her child had ever since occupied it as such homestead, that it was situated wholly upon lot three (3) and that she had never relinquished her homestead right therein or made any conveyance or relinquishment thereof, and she asked that the case be certified to the District Court for trial and determination. A reply was filed and the Court heard evidence and gave judgment that the complainant, Aleck E. Johnson, have restitution of the premises and that he recover of defendant, Helen M. Johnson, \$8.85 costs. She appeals therefrom to this court.

David F. Peebles, for appellant.

The defendant alleges that her occupancy of the premises in question is not under the lease but under a homestead right vested in her and her infant daughter by 1878 G. S. ch. 68, § 1, upon plaintiff's alleged desertion of his family. She further claims that because of such homestead right the lease was without consideration and is void. The trial court assumed that this defense was barred by the decrees in Illinois and in this state and that said decrees conclusively estopped the defendant from litigating the issues raised by the pleadings. The lease, if between husband and wife, would be void under 1878 G. S. ch. 69, § 4. *Sanford v. Johnson*, 24 Minn. 172. Upon desertion by the husband the wife became vested with the right to occupy the homestead with the same right therein as any other owner of a homestead under the laws of this state. 1878 G. S. ch. 68, § 1. A vested homestead right in the wife could not be divested by the Illinois decree even if valid, because extraterritorial. *Barrett v. Failing*, 3 Fed. Rep. 471. Nor could the courts of this state in a suit for adjustment of alimony divest the wife of her separate property. 1878 G. S. ch. 62, § 29. As to the foreign judgment of divorce, and there was none other, it is well settled that it may be impeached for want of jurisdiction, where both parties were residents of Minnesota and where the defendant did not appear in the case. *State v. Armington*, 25 Minn. 29; *In re Ellis' Estate*, 55 Minn. 401.

Moritz Heim, for respondent.

At the opening of the trial defendant objected to the hearing and to the introduction of any evidence on the ground of want of jurisdiction, and excepted to the overruling of this objection. She assigns this ruling as error, but does not discuss the point in the argument nor does she indicate the reasons for her objection. In such case the point will be deemed to have been abandoned. *Moody v. Tschabold*, 52 Minn. 51; *Smith v. Bean*, 46 Minn. 138.

The court does not lose jurisdiction until it appears on the trial that an adjudication of title or equitable matter is necessarily involved. *Butler v. Bertrand*, 97 Mich. 59; *Radley v. O'Leary*, 36 Minn. 173; *Steele v. Bond*, 28 Minn. 267.

Defendant cannot avail herself of her supposed defense, because it is equitable in its nature and requires affirmative relief, and cannot be interposed in a proceeding like the present to remove an overholding tenant. *Morton v. Beckman*, 53 Minn. 456; *Petsch v. Biggs*, 31 Minn. 392.

The jurisdiction over parties and subject matter being unquestioned the domestic judgment in Ramsey County District Court is not in the present collateral proceeding subject to attack for defect. It follows that defendant was precluded from showing by oral testimony that she still remained the wife of plaintiff, that he deserted her, and that the property in controversy is the homestead of herself and child. Those matters were necessarily adjudicated in that action. *In re Ellis' Estate*, 55 Minn. 401; *Sandwich Mfg. Co. v. Earl*, 56 Minn. 390; *Mooney v. Hinds*, 160 Mass. 469; *Shafer v. Bushnell*, 24 Wis. 372.

A woman who remains in her former husband's house after a divorce from him is a trespasser. *Brown v. Smith*, 83 Ill. 291.

Where the tenant retains the premises after notice from the landlord that he would require a greater rent than under the lease, the tenant must be held to have assented to the increase of rent, and to this extent the terms of the old lease do not apply. *Gardner v. Commissioners of Dakota Co.*, 21 Minn. 33; *Despard v. Walbridge*, 15 N. Y. 374.

MITCHELL, J. The defendant's first assignment of error, to wit, that the Municipal Court of St. Paul "erred in assuming jurisdiction to try and determine the action," not being discussed or referred to in the points or argument, must be deemed to have been abandoned.

The judgment of the District Court of Ramsey county, in this state, in the former action between the same parties, was conclusive between them upon all issues, whether principal or subordinate, which were actually tried and directly passed upon, and was not subject to collateral attack, and was decisive, adversely to defendant, of every material issue in the present action, unless it was as to defendant's nonpayment of rent. But an examination of the record satisfies us that the trial proceeded throughout upon the theory that there was no such issue in the case, and that the point was

never once suggested or called to the attention of the court on the trial. There are no merits in the appeal.

Judgment affirmed, and cause remanded, with directions to the court below to enforce the judgment.

(Opinion published 58 N. W. 824.)

HENRY TURNER vs. WILLIAM C. KENNEDY.

Submitted on briefs April 11, 1894. Reversed April 20, 1894.

No. 8816.

Fixtures, as between landlord and tenant.

If the owner of a house built by license on the land of another fails to remove it within a reasonable time after being ejected from the land by the owner thereof, such house becomes a part of the realty, and ceases to be the property of such licensee.

Agency, ratification by principal of unauthorized act of agent.

Ratification of the acts of an unauthorized agent, by neglect for an unreasonable length of time to repudiate them, is an application of the doctrine of equitable estoppel, which may be invoked against the party guilty of such laches, but not in his favor.

Appeal by defendant, William C. Kennedy, from an order of the District Court of Marshall County, *Frank Ives, J.*, made April 21, 1893, granting the motion of plaintiff, Henry Turner, for a new trial.

In the fall of 1889, plaintiff built a portable frame dwelling house sixteen feet long by fourteen feet wide on the land of a railroad company with its license. The house was built on skids or timbers hewed in the shape of sleigh runners resting on boards lying on the ground. It was worth \$80 or \$90. The railroad company brought ejectment and put plaintiff off the land in April, 1891, and sold the land to Elizabeth Kennedy, defendant's wife. Plaintiff left the house in the care of his brother Thomas. He without authority soon after gave defendant possession of the house and he moved into it and built an addition to it. On January 6, 1892, plaintiff demanded the house and was prepared to

remove it. Being refused he brought replevin for it in Justice's Court and had judgment. Defendant appealed to the District Court where the issues were retried and defendant had a verdict by direction of *Hon. Ira B. Mills, J.* Plaintiff made a motion before *Hon. Frank Ives*, successor of Judge Mills, and obtained an order for a new trial. From that order defendant appeals.

William Watts, for appellant.

On the facts the house became a part of the realty. *Little v. Willford*, 31 Minn. 173; *Howard v. Fessenden*, 14 Allen, 124; *McLaughlin v. Nash*, 14 Allen, 136; *Bonney v. Foss*, 62 Me. 251; *Washburn v. Sproat*, 16 Mass. 449; *Huebschmann v. McHenry*, 29 Wis. 655.

Plaintiff by laches in not removing the house prior to the time he demanded it lost all right to it. *Erickson v. Jones*, 37 Minn. 459; *Smith v. Park*, 31 Minn. 70.

William C. Brown and *H. W. Brown*, for respondent.

The house was personal property and could be removed. *Little v. Willford*, 31 Minn. 173; *Ingalls v. St. Paul, M. & M. Ry. Co.*, 39 Minn. 479.

The railway company in 1887 gave the Turner Brothers a license to enter on the land and build. There is nothing in the evidence to show that this license was ever revoked until April 15, 1891, at which time it was impliedly revoked by the ejecting of the Turner Brothers from the land. After that the plaintiff had a reasonable time in which to remove the house. *Ingalls v. St. Paul, M. & M. Ry. Co.*, 39 Minn. 479.

But on the same day that the license was thus revoked the railway company turned the possession and control of the land over to defendant and on the same day defendant asked plaintiff's brother, Thomas Turner, for the use of the house in controversy until after breaking season, and stated that he would leave after that time and plaintiff could then have his house back again. With this understanding Thomas let defendant have the house, and defendant and his wife continued to occupy it until it was taken under the writ in this action. These acts on the part of

defendant constitute a new license to keep the house on the land, and this new license continued right up to the time the house was demanded.

When the evidence closed the case should have been submitted to the jury. There was evidence to support a verdict for plaintiff and the court erred in directing a verdict for the defendant.

CANTY, J. In 1887 the plaintiff and his brothers entered into negotiations with the St. Paul, Minneapolis & Manitoba Railway Company, by which they got leave to build on a certain eighty acres of land which was claimed by it as indemnity land, but for which it had at that time no patent. Plaintiff built the house in question, and he and his brothers made other improvements on the land. After the railway company procured its patent and had some further negotiations with the Turners for the sale of the land to them, it commenced an action of ejectment against them, procured judgment, and executed a writ of ejectment on the 15th of April, 1891, by which it got possession of the land. A few days before this, the railway company had sold the land to Elizabeth Kennedy, the wife of the defendant, and, upon obtaining possession of the land, it immediately turned the possession over to her. When the writ was executed, the house in question was vacant, and there was no one present upon the land except Thomas F. Turner, plaintiff's brother, who on the same day made a lease with defendant, whereby defendant in his own name leased the land to the Turners, reserving to himself the use of this house, and Thomas F. Turner signed the names of himself, plaintiff, and his other brother to the lease. Kennedy immediately went into possession of the house, and Thomas Turner of the rest of the premises.

The house was a frame structure, built on skids turned up at the ends like sleigh runners, which rested on boards on the ground, so that it could be readily hauled away.

The defendant took possession of it, built an addition fourteen by sixteen feet to it, and lived in it until January 6, 1892, when plaintiff demanded possession of it, and within two or three days afterwards commenced replevin proceedings for it in justice's court. After a trial, the case was appealed to the District Court,

and at the close of the evidence on the trial there a verdict was ordered for the defendant. Plaintiff moved for a new trial before the successor of the judge who tried the case, on the grounds that the verdict was not justified by the evidence, and for errors of law occurring on the trial. The motion was granted, and defendant appeals.

The complaint in replevin alleges that defendant wrongfully took the house on the 15th day of April, 1891, and plaintiff made no claim to it for nearly nine months afterwards, and he makes no attempt to excuse his laches.

It is true that there is evidence to the effect that, at the time the writ of ejectment was executed, Thomas Turner told defendant that this house belonged to plaintiff, but that defendant could use it during the breaking season, and then leave it, which defendant agreed to do, and that Thomas informed plaintiff of this within a week afterwards. But plaintiff and Thomas both testify that Thomas had no authority to rent, or in any way dispose of, this house, or do anything at all with it except to take care of it, so that it would not be burned down. There is no evidence that plaintiff in any manner ever consented to this arrangement. But it is claimed that his own laches in failing to act or elect or to inform defendant of that election in the matter, amounted to ratification by plaintiff in his own favor, while the defendant was apparently acting on his rights, or those of his wife as owner in possession, occupying the house, and building an addition to it. Ratification of the unauthorized acts of an agent by neglecting for an unreasonable length of time after knowledge of them to repudiate them, while the opposite party is acting on them, is an application of the doctrine of equitable estoppel. It is applied against the party guilty of laches, not in his favor.

The fact that the house was built on skids, as described, is a circumstance going to show that plaintiff intended that the house should remain personal property, and that he intended to remove it; but it would not excuse him for failing to remove it for an unreasonable length of time.

We are of the opinion that by reason of plaintiff's laches in failing to remove the house within a reasonable time after he was dispossessed, the house became a part of the realty, and has ceased

to be the property of the plaintiff. *Smith v. Park*, 31 Minn. 70, (16 N. W. 490.)

The order appealed from is reversed.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 823.)

MIKE MEAD *vs.* CHARLES E. SANDERS.

Submitted on briefs April 9, 1894. Affirmed April 20, 1894.

No. 8463.

Practice in Justice's Court.

Whether, after the commencement of a trial in a justice court before a jury, it is error or abuse of discretion on the part of the justice to adjourn court for six days, without the consent of appellant, is not decided. *Held*, that in any event it was waived by the appellant failing to except thereto, and by his appearing and proceeding with the trial at the time to which it was adjourned.

Appeal by defendant, Charles E. Sanders, from a judgment of the District Court of Rock County, *P. E. Brown, J.*, entered May 15, 1893, against him for \$3 damages and \$29 costs.

L. S. Nelson, for appellant.

A. J. Daley, for respondent.

CANTY, J. This action was commenced in a justice court to recover \$10 damages, caused by defendant's cattle going upon plaintiff's land, and eating his straw and fodder. The jury, after laboring two days, brought in a verdict for plaintiff for \$3. Defendant appealed to the District Court on questions of law, and, upon affirmance by that court, appealed to this.

On the trial, plaintiff called the defendant for cross-examination, and asked him what had become of a contract under which defendant had cropped part of the land, and under which he claimed a right to the straw and fodder. He answered that he gave it to his attorney. This question was objected to by defendant, and the

overruling of the objection by the justice is assigned as error. We are unable to see the error. The trial commenced at half past one o'clock Saturday afternoon, and, after the case was partly tried, some time that afternoon or evening, the court adjourned to the following Friday. The defendant objected to the adjournment, but took no exception. It must be understood from the record that he appeared and proceeded with the trial at the time to which it was adjourned, so that, if there was any irregularity in the adjournment, it was thereby cured. These are the only errors urged by appellant.

The appeals are about as frivolous as the original action, and the parties should be given a chance to rest from their legal strife.

The judgment appealed from should be affirmed. So ordered,

BUCK, J., absent, took no part.

(Opinion published 53 N. W. 633.)

In re HORATIO N. THOMPSON'S ESTATE.

Argued by appellant, submitted on brief by respondent, April 13, 1894. Affirmed April 20, 1894.

No. 8339.

Revocation of decree of distribution.

An estate having been fully administered, the administration closed, and the administrator discharged, and the real estate assigned to B. F. as sole heir, a will devising the real estate to others was subsequently admitted to probate, and an administrator with the will annexed appointed. *Held*, there being nothing to administer, there could be no legitimate charges of administration under the second administrator for which real estate could be sold; that administrator had no interest in the real estate, and could not apply for a revocation of the decree assigning it.

Appeal by Charles Passavant, administrator with the will annexed of the estate of Horatio N. Thompson, deceased, from an order of the District Court of Ramsey County, *Hascal R. Brill, J.*, made May 16, 1893, denying his motion for a new trial.

Horatio N. Thompson of West Middleton, Washington County, Pa., died testate November 3, 1868. He owned lots 56, 57, 58, and

59 in Whitacre, Brisbin & Mullen's Subdivision of lots one (1) and two (2) of Leech's Outlots in St. Paul. By his will he devised to his mother, Elizabeth Thompson, and his two sisters, Harriet D. Stackhouse and Matilda P. Hamilton, all his real estate, to each an undivided third in fee. Within two months after his death his will was duly admitted to probate in Washington County, Pa., and his estate in that state subsequently administered. His devisees seem to have been ignorant of the fact that he owned any property in Minnesota. His mother, Elizabeth Thompson, afterwards died intestate and her undivided third descended to her five surviving children. Her son, Benezet F. Thompson, inherited an undivided fifteenth interest in the St. Paul lots. He afterwards died July 22, 1872, intestate and in June, 1887, his heirs, Harriet L. Arter and Charity A. Thompson, for \$200 quitclaimed to Margaret L. Berryhill all their interest and estate in the St. Paul lots. They at the same time presented to the Probate Court of Ramsey County their petition that Charles J. Berryhill, husband of the grantee, be appointed administrator of the estate of Horatio N. Thompson. This petition stated that Horatio N. died intestate and unmarried leaving no issue, parent or sister and that Benezet F. Thompson was his only brother and his sole heir at law. Notice was served by publication and letters of administration were issued to Berryhill and he administered the estate in this state and on his report and petition a final decree of distribution was made August 17, 1888, discharging the administrator and adjudging that Horatio N. Thompson died intestate and that Benezet F. Thompson was his sole heir at law and that the title to the St. Paul lots descended to and vested in him.

Margaret L. Berryhill and husband afterwards sold and conveyed lot 56 to John W. Maloney who bought in good faith and paid \$1,600 for it. She and husband also sold and conveyed lots 58 and 59 to John E. Williams who also bought in good faith and paid \$3,000 for them. On November 11, 1889, the sister, Harriet D. Stackhouse, presented a certified copy of the will in the Probate Court of Ramsey County and petitioned that court to allow and record the will and appoint Charles Passavant administrator with the will annexed. Laws 1889, ch. 46, §§ 32-34. Margaret L. Berryhill appeared and opposed and the petition was refused. Mrs. Stackhouse appealed to the District Court where the refusal was affirmed. She then

appealed to this court where the order was reversed with direction to the Probate Court to file and record the copy will. *Stackhouse v. Berryhill*, 47 Minn. 20. This was done September 3, 1891, and Passavant appointed. On May 27, 1892, Passavant presented his petition in the Probate Court stating the facts and asking that Court to revoke the decree of distribution of August 17, 1888. An order was granted directing all parties interested to show cause August 23, 1892, why this should not be done. The grantees of the lots appeared and answered that the petitioner and her sister had conveyed all their interest in the lots to William K. Gaston and had no interest and that Gaston only could move in the matter. They also answered that the Probate Court had no jurisdiction of the subject matter. But on September 8, 1892, that court granted the petition and revoked the decree of distribution, saying that after hearing testimony of the parties it appeared to the court that the decree of August 17, 1888, was procured by fraud, misrepresentation and false testimony and that it did not appear that the grantees of the St. Paul lots purchased in reliance on that decree without notice or knowledge that it was procured by fraud. The grantees appealed to the District Court where this decree was reversed, the court saying that the question of title to the St. Paul lots could not be determined in the Probate Court, that the proceeding should be taken by the devisees, and not by the administrator with the will annexed, as there are no debts and he has no interest in the real estate. Passavant moved for a new trial, but was refused, and he brings this appeal.

Daniel W. Doty, for appellant.

It is conceded that the four St. Paul lots are all the property, real or personal, in this state of Horatio N. Thompson, that there are no debts against his estate except the costs of administration under the will. They already amount to a considerable sum, for publishing notices, paying necessary counsel fees and disbursements, in Probate, District and Supreme courts in establishing the will and in the present proceeding. This real estate is assets in the administrator's hands for the payment of costs of administration under the will. In no other way can these costs be paid but by a sale of this real estate. No steps can be taken to sell until the

final decree of distribution of August 17, 1888, is vacated. *Dampier v. St. Paul Trust Co.*, 46 Minn. 526; *Miller v. Hoberg*, 22 Minn. 249.

Charles J. Berryhill, for respondent.

1866 G. S. ch. 47, § 26, in force when Horatio N. Thompson died provided that all the estate of the testator, real and personal, is liable for the payment of his debts and the expenses of administering his estate. 1866 G. S. ch. 57, § 1, provided that when the personal estate is insufficient to pay debts with the charges of administration the executor or administrator may sell real estate for the purpose.

The Probate Code, Laws 1889, ch. 46, § 107, provides that no claim against a decedent shall be a charge against his estate unless presented within five years after his death and this provision is made applicable to the estates of persons who died prior to its enactment.

From these provisions of statute it appears there can be no debts against the estate requiring a sale of real estate for their payment and that the statute does not authorize a sale of the heir's inheritance to pay expenses of administration. Services of lawyers rendered the devisees twenty years after the testator's death are not to be paid by a sale of the testator's real estate long since passed into the hands of innocent purchasers. No sale of real estate will be ordered to pay expenses of administration alone, if there are no debts of the decedent, or to reimburse the administrator for outlay made by him in the course of administration or to pay debts incurred by the executor or administrator after the death of the testator or intestate. *Owen v. Childs*, 58 Ala. 113; *Fitzgerald v. Glancy*, 49 Ill. 465; *Walker v. Diehl*, 79 Ill. 473; *Dubois v. McLean*, 4 McLean, 486; *Dean v. Dean*, 3 Mass. 258; *Drinkwater v. Drinkwater*, 4 Mass. 354; *Sumner v. Williams*, 8 Mass. 162; *Heath v. Wells*, 5 Pick. 139; *Campau v. Gillett*, 1 Mich. 416; *Moore v. Ware*, 51 Miss. 206; *Hollman v. Bennett*, 44 Miss. 322; *Farrar v. Dean*, 24 Mo. 16; *Fitch v. Whitbeck*, 2 Barb. Ch. 161; *Wood v. Byington*, 2 Barb. Ch. 387; *Baker v. Kingsland*, 10 Paige, Ch. 366; *Nowell v. Nowell*, 8 Me. 220; *Torrance v. Torrance*, 53 Pa. St. 505; *Walworth v. Abel*, 52 Pa. St. 370.

The mandate in *Stackhouse v. Berryhill*, 47 Minn. 20, did not require the appointment of an administrator with the will annexed. None was necessary. The appointment was made, however, and now the court is asked by the appointee to set aside the decree of distribution to enable him to sell the real estate of the heir to pay his fees and expenses. It can not be done.

GILFILLAN, C. J. In November, 1868, one H. N. Thompson died in Pennsylvania, leaving real estate in this state. In 1887 an administrator was appointed as in case of intestacy in Ramsey county, in this state. In August, 1888, this administration was closed by a decree of the Probate Court, reciting that all costs and debts have been paid, and the estate fully administered, discharging the administrator, and assigning the real estate to one Benezet F. Thompson, as sole heir at law, without prejudice to any conveyance he may have made of it. He appears to have previously conveyed it, and his grantee conveyed most of it to others. In November, 1889, a will by H. N. Thompson, devising the real estate to others than Benezet F., was produced, and July 21, 1891, admitted to probate in the Probate Court of Ramsey county, and Charles Passavant, the appellant, was appointed administrator with the will annexed. As the title to the real estate passed without administration, as there had been full administration, and as there was no personal property, no debts, and no unpaid legacies, the need for another administrator is not apparent; and what such administrator could do, unless to incur constructive costs, is not apparent. In 1892 Passavant, the second administrator, filed in the Probate Court a petition asking that the decree assigning the property to Benezet F. Thompson be revoked, set aside, and vacated, and that court, by decree dated September 1, 1892, so revoked it. The parties claiming under Benezet F. Thompson opposed the petition, and appealed from the decree to the District Court, which reversed it, on the ground that the administrator, having no interest in the real estate, could not prosecute the petition for the decree.

This decision was right. If it be conceded that real estate may be sold to pay charges of administration, and that, with a view to payment of such charges and debts and legacies, he may take possession of real estate, still in this case there could be no legitimate

charges of administration, and there were no debts or legacies. There could be no legitimate charges of administration, for there was nothing to administer. There had already been full administration.

The will having been established, undoubtedly the parties interested in the real estate, to wit, the devisees or their successors in interest, may, on a proper showing before the proper tribunal, have relief in the premises. The District Court as a court of equity is a proper tribunal to grant such relief, but it may be doubted that the Probate Court can do so, though the case does not call for a decision of that point.

Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 53 N. W. 682.)

Application for reargument denied May 2, 1894.

OLE QUELPRUD *vs.* C. H. KOTHE.

Submitted on briefs April 9, 1894. Affirmed April 20, 1894.

No. 3462.

Verdict supported by the evidence.

The evidence in this case was sufficient to justify the verdict.

Appeal by defendant, C. H. Kothe, from an order of the District Court of Rock County, *P. E. Brown, J.*, made May 12, 1893, refusing his application for a new trial.

The plaintiff, Ole Quelprud, worked for defendant as servant on his farm from March 25, to September 19, 1892, at \$22 per month. He brought this action to recover \$88.65 the unpaid balance of his wages. Defendant claimed that he had paid the man in full. The jury found for the plaintiff. A motion for a new trial was made by defendant, but was denied and he appeals.

A. J. Daley, for appellant.

L. S. Nelson, for respondent.

PER CURIAM. As was stated by the court below in its charge to the jury, no exception being taken thereto, the only dispute between the parties was whether plaintiff had been paid in full for his services, and on this the finding was in his favor. There was evidence reasonably tending to support the verdict, for we do not agree with counsel for defendant in his assertion that plaintiff's testimony was so inconsistent, improbable, and contradictory that it should have been wholly rejected.

Order affirmed.

(Opinion published 58 N. W. 682.)

ALEXANDER BLYHL vs. VILLAGE OF WATERVILLE.

87	115
70	218

Submitted on briefs April 4, 1894. Affirmed April 20, 1894.

No. 8600.

Municipal liability for defective street.

A municipal corporation is liable for an injury caused by an unsafe condition of a sidewalk, although the defect exists in the plan adopted by it for constructing the sidewalk, if there be no necessity or reason for having the defect.

Appeal by defendant, the Village of Waterville, from a judgment of the District Court of Le Sueur County, *Francis Cadwell, J.*, entered against it September 12, 1893, for \$150 damages and \$150.35 costs and disbursements.

The plaintiff, Alexander Blyhl, was a blacksmith forty years of age and resided in Waterville. On October 17, 1892, he went down town in the evening and on his return at about nine o'clock he went west along the sidewalk on the south side of Paquan Street. A new sidewalk had been built part of the way eight inches higher than the old one. The night was dark and rainy and when plaintiff reached the new walk he failed to see the step and walked against it and fell forward and had two ribs broken. He brought this action to recover damages, claiming his injury was due to the negligence of the village in leaving such a step

in the sidewalk when the surface of the ground made no necessity for it. He had a verdict for \$150. Judgment was entered thereon and the village appeals.

M. R. Everett and H. S. Gipson, for appellant.

The plaintiff seeks to review in the courts the official action of the authorities of the village in adopting, after due consideration of the topography of the locality, a sidewalk having a step of eight inches in preference to one having a graduated incline.

Negligence cannot be predicated upon the plan on which the walk was built for that is in the discretion of the village authorities. In determining whether there should be a step at the point of union of the two sections of the walk, or a graduated incline, the authorities acted in a *quasi* judicial character, and their action in that regard was judicial in its nature and is not subject to review in the courts nor can it be made the ground of a civil action for damages. *Detroit v. Beckman*, 34 Mich. 125; *Toolan v. Lansing*, 38 Mich. 315; *Davis v. Mayor of Jackson*, 61 Mich. 530; *Urquhart v. Ogdensburgh*, 91 N. Y. 67; *McCutcheon v. Homer*, 43 Mich. 483; *Carr v. Northern Liberties*, 35 Pa. St. 324; *Shippy v. Village of Au Sable*, 65 Mich. 494; *Cram v. City of Chicago*, 138 Ill. 506; *Green v. Swift*, 47 Cal. 536; *Johnston v. District of Columbia*, 118 U. S. 19; *Fellows v. City of New Haven*, 44 Conn. 240; *Child v. City of Boston*, 4 Allen, 41; *Hines v. City of Lockport*, 50 N. Y. 236; *Watson v. Cambridge*, 157 Mass. 561; *Cook v. City of Milwaukee*, 27 Wis. 191; *Schroth v. City of Prescott*, 63 Wis. 652; *Lynch v. Mayor*, 76 N. Y. 60.

No fault is found with the construction of the walk or step but plaintiff attacks the plan the officers decided to adopt, and puts the ground of liability upon a failure to adopt another plan, "a graduated incline walk." We submit the action cannot be maintained for the reason, among others, that the action of the village authorities was *quasi* judicial and not subject to review in the courts. The power to determine upon a plan and method of improving streets and highways is a discretionary one, and a mere error of judgment in respect to the plan will not subject the town to an action for damages.

John Moonan and F. B. Andrews, for respondent.

As far back as *City of St. Paul v. Kuby*, 8 Minn. 154, this court said, there is no rule of law which determines or can determine what shall constitute a safe and suitable sidewalk in any given case. It is manifestly impossible to establish a uniform rule upon the subject since the sufficiency of a sidewalk in any particular case must depend upon the facts and circumstances existing and connected with such case. That doctrine has been the accepted law of this state ever since. *Tabor v. City of St. Paul*, 36 Minn. 188; *Dillon, Munic. Corp.* (3rd Ed.) § 66; *Snider v. City of St. Paul*, 51 Minn. 466; *Readdy v. Shamokin*, 137 Pa. St. 98.

Whether the walk was in a reasonably safe condition for travel was for the jury. *Nichols v. City of St. Paul*, 44 Minn. 494; *City of St. Paul v. Kuby*, 8 Minn. 154; *Graham v. City of Albert Lea*, 48 Minn. 201; *Kellogg v. Village of Janesville*, 34 Minn. 132; *Young v. Village of Waterville*, 39 Minn. 196.

GILFILLAN, C. J. The defendant, a municipal corporation, required an owner of a lot abutting on one of its streets to construct a plank walk along the street by the side of his lot, and he constructed it on a grade given him by, and under the direction and with the approval of, defendant's street commissioner. As constructed, the walk made, at the junction of this new walk with the walk along the remainder of the block, a drop or step seven or eight inches in height. It is apparent there was no necessity or reason for having the drop instead of gradually sloping the grade of the new walk until it came to the grade of the remainder. It is also apparent that so sloping it would have made a safe walk, and that the drop made it dangerous to one passing along it in the dark. After the walk had been in that condition for about a month, plaintiff, passing along it in the dark, hit his foot against the face of the drop, and fell, and was injured, and brings this action to recover for the injury. From a judgment after verdict in his favor the defendant appeals.

Unless the defendant is exempt from liability on the ground claimed by it as hereinafter stated, the existence of the drop in the sidewalk to the knowledge of defendant, through its street commissioner, was sufficient to make defendant's negligence a ques-

tion for the jury. *Tabor v. City of St. Paul*, 36 Minn. 188, (30 N. W. 765.)

The defendant claims it cannot be held, because the defect in the walk was in the plan on which it was constructed; that the adoption by a municipal corporation of a plan for a public improvement is a legislative or discretionary function, and that the corporation is not liable for the consequences of any error in the discharge of such functions.

That a municipal corporation is not liable for consequential injuries arising from the *bona fide* exercise of, or omission to exercise, those powers which are conferred on its council or legislative body, and the exercise of which as to the time, extent, and manner is left to the discretion or judgment of such body, has been fully recognized by this court. *Lee v. City of Minneapolis*, 22 Minn. 13; *Alden v. Same*, 24 Minn. 254.

Most municipal public improvements come within such powers. Thus, unless controlled by charter provisions, when street grades shall be established, and on what planes or levels; when grades shall be changed, and to what planes; when streets shall be paved, and with what kind of pavement; when sidewalks and crosswalks shall be laid, and of what material; what sewers, gutters, and catch basins shall be made, and when and how,—are usually left to the judgment or discretion of the legislative body of the corporation. And while, of course, it is expected the best results to the people of the corporation will follow the efforts of that body, it is not enjoined as a duty to produce any particular result, so that failure to bring it about will make the corporation liable for consequential injuries.

The matter of keeping streets and sidewalks in safe condition stands on a different footing. It has always been held in this state that a municipal corporation having exclusive control of its streets, when the means are within its power, has imposed on it a positive duty to keep such streets in reasonably safe condition. Scores of recoveries for injuries resulting from neglect of that duty have been sustained in this court. The first formal statement of the rule was in *Shartle v. City of Minneapolis*, 17 Minn. 308 (Gil. 284) in these words: "It is well settled that a municipal corporation having the exclusive control of the streets and bridges

within its limits, at least if the means for performing the duty are provided or placed at its disposal, is obliged to keep them in a safe condition; and if it unreasonably neglects this duty, and injury results to any person by this neglect, the corporation is liable for the damages sustained."

In this particular there is not only a power conferred, but there is also a duty imposed, to use the power with a view to a particular result, to wit, the safe condition of the streets. Of this duty Dill. Mun. Corp. (4th Ed.) § 1023a, says: "Which duty is not legislative or judicial, but rather, in its nature, ministerial." It is therefore not left to the corporation's legislative body to determine when or to what extent the duty shall be performed, nor to determine it has been performed; for, if it were, it would be a discretionary, not a positive, duty.

That the safe condition of streets concerns the safety of life and limb, and not only convenience or property, is a reason for imposing a duty in respect to it greater than is imposed with respect to other matters of public improvement.

No question is made, nor can there be, on the decisions that, if a dangerous defect is due to wear, decay, accident, or the act of a third person, the corporation, upon notice of it, must seasonably repair it. In this case, if the property owner had, without authority, constructed the sidewalk with the dangerous defect, it would have been the duty of the corporation to seasonably remedy it. The corporation might adopt or ratify the plan on which the owner constructed the walk; but to hold that by so adopting or ratifying it it could avoid the duty to remedy the defect would enable it to determine whether it would perform the duty imposed on it or not, and it would cease to be a duty.

And if the corporation is not liable in case of a dangerous defect in a street or sidewalk, because the defect is in the plan previously adopted for its construction, then, although it is its duty to keep the streets in safe condition as against natural causes or the acts of third persons, it is not its duty to keep them in such condition as against its own acts. And whether it is its duty or not will depend on whether it is responsible for the unsafe condition; and if it may, without liability, determine in advance, in adopting a plan for construction, that a certain condition of the

street or walk will be safe enough, we do not see upon what principle it is to be liable if, after the condition exists, from whatever cause, it determines the street or walk to be safe enough, and to need no repair.

We have not used the term "positive duty" in the sense that the corporation insures the safe condition of its streets, or that it is bound to maintain them in that condition without reference to the difficulties in the way of doing so. There may be defects that are practically irremediable. The topography of the ground may be such as to render it practically impossible to have the streets entirely safe. In that case the people must accept such as with reasonable efforts can be provided. The law does not require of the corporation unreasonable things, but only that it shall employ, in performing its duty as to streets, the diligence, care, and skill that an ordinarily prudent person having a similar duty to perform would employ. If it do so, there is no unreasonable neglect. So far as concerns the safe condition of a street or sidewalk, the same requirement applies to adopting a plan either for its construction or repair. Of course the corporation would not be liable merely because, in the opinion of a jury, a safer or better plan might have been adopted. To illustrate, we may suppose a not uncommon case, where, owing to the character of the surface, a sidewalk must be constructed on one of two plans, each leaving it more or less unsafe,—one requiring a slope so steep as to be unsafe; the other, steps that will make it unsafe. The corporation would not be liable for the dangers in the plan adopted merely because, in the opinion of a jury, the other would have been safer. To make the corporation liable, the plan adopted would have to be so much and so obviously more unsafe than the other as to show a neglect to employ the diligence, judgment, and skill in determining the plan which ordinary care would require.

We are cited to some decisions in Michigan, New York, and Pennsylvania to the effect that a corporation is not liable for the consequences of a dangerous defect in a street or walk due to the plan adopted for its construction, because it is only an error of judgment in a matter resting wholly in the judgment or discretion of the corporation. Those decisions are irreconcilable in principle with other decisions of the same courts, and inconsistent

with the proposition that keeping streets in reasonably safe condition is a matter of positive duty, and not of discretion.

We are therefore of opinion that the mere fact that an unsafe condition of a street is due to a defect in the plan for its construction will not shield the corporation from liability for injuries caused by such unsafe condition. There is no merit in any of the other points made by appellant.

Judgment affirmed.

CANTY, J. I agree with the result in this case and with the foregoing opinion, except that it seems to me it does not sufficiently limit the right of the courts to impeach or review the legislative judgment in adopting the plan of improvement. When the alleged defect appears to be a part of the plan, it should be presumed to be of legislative, not of ministerial, origin, until the contrary is proved. The courts cannot review the legislative judgment at all. They can impeach it only when it is not legislative judgment in fact. Unless it appears that the alleged defect is of ministerial origin, it must appear that there is such gross mistake in the adoption of the plan as would imply a failure to exercise the legislative judgment. If two reasonable minds might have adopted different plans, the legislative judgment cannot be impeached for having adopted either one of these plans.

(Opinion published 58 N. W. 817.)

MARY A. FOREPAUGH vs. WILLIAM P. WESTFALL.

Submitted on briefs April 4, 1894. Affirmed April 20, 1894.

No. 8676.

Assignee of an insolvent. His liability for rent.

Held an assignee for the benefit of creditors does not accept a leasehold interest, and the burdens thereof, by merely accepting the trust.

Extent of his liability for rent.

Held that, if such an assignee does accept the lease, he is liable for the rent, while he holds such leasehold interest.

57	121
58	57
57	121
160	307

Acts not amounting to an election to take the lease.

But *held*, that such an assignee under our insolvency law, being an officer of the court, may go upon the leased premises and there perform his trust by selling the assigned goods, or even continuing the business a short time under the direction of the court, without thereby electing to take the lease, especially if no step is taken by the landlord or assignor to compel him to elect.

Occupancy for a month not an election to take.

Under the circumstances of this case, it is *held*, that he might so perform his trust on the leased premises for one month without thereby incurring the liability of taking the lease.

Appeal by plaintiff, Mary A. Forepaugh, from a judgment of the District Court of Ramsey County, *John W. Willis, J.*, entered December 2, 1893.

On June 12, 1891, Joseph L. Forepaugh leased to the Seven Corners Bank, rooms on the corner of West Seventh and Eagle Streets in St. Paul for three years from and after September 1, 1891, to be occupied by it for its banking house. The bank agreed to pay him \$80 rent each month in advance during the term. The bank entered and paid the rent to August 1, 1893. Joseph L. Forepaugh died testate July 8, 1892. His will was admitted to probate. The plaintiff was sole devisee and legatee. A final decree of distribution was made March 29, 1893, assigning all his property to the plaintiff. On August 1, 1893, the bank being insolvent made an assignment under Laws 1881, ch. 148, as amended by Laws 1893, ch. 30, of all its property to the defendant, William P. Westfall, in trust for its creditors. He accepted the trust and occupied the demised premises in executing it during the month of August, 1893, and paid plaintiff the rent for that month. On the last day of that month he abandoned the premises and refused to pay rent thereafter although he had in his hands ample assets of the insolvent. Plaintiff brought this action to recover \$80 rent for September, 1893, and in her complaint stated these facts. The answer restated the facts in substance and denied defendant's liability. The cause came to trial October 16, 1893, when defendant objected to the introduction of any evidence and moved for judgment on the ground that the complaint did not state facts constituting a cause of action. The court granted the motion. Plaintiff excepted. Judgment was entered and she appeals.

Warren H. Mead, for appellant.

The assignee had the right to waive the term and avoid liability for the future rent, but by entering into possession of the premises he elected to take the lease and use the premises, and the law then invested him with a privity of estate which made him liable for the rent. The interest of the assignee continues until he sells the lease to another. The assignee still controls this lease. To get rid of that liability when it thus attaches the assignee must get rid of the lease and his interest therein. A subsequent abandonment of the premises still holding his interest in the lease will not remove that liability. There is nothing in our insolvency laws that changes this. *Commonwealth v. Franklin Ins. Co.*, 115 Mass. 278; *Hoyt v. Stoddard*, 2 Allen, 442.

The case of *Wilder v. Peabody*, 37 Minn. 248, has no application to this case. That was a contingent claim which might never ripen and the court held it not provable against the estate. That is not this case, nor does it rest on the same legal principles.

This is an action against Westfall for a charge which he has voluntarily incurred since the assignment to help carry out his trust, the same as a charge for fuel or anything else required. It is not an existing claim against the bank sought to be proved against the estate under the insolvency laws, but a disbursement of the assignee, hence his personal liability. *Dorrance v. Jones*, 27 Ala. 630; *Bourdillon v. Dalton*, 1 Esp. 233; *Copeland v. Stephens*, 1 B. & A. 593; *Welch v. Meyers*, 4 Camp. N. P. 368; *Clark v. Hume*, Ryan & Moody, N. P. 207; *Hanson v. Stephenson*, 1 B. & A. 303; *Thomas v. Pemberton*, 7 Taunt. 206.

C. D. & Thos. D. O'Brien, for respondent.

The entire question was presented and determined in the case of *Wilder v. Peabody*, 37 Minn. 248.

CANTY, J. The complaint in this action alleges that the plaintiff's tenant, carrying on a banking business on the leased premises, made an assignment to defendant for the equal benefit of all its creditors under the laws of this state. That defendant took possession of the premises, and "continued the business thereon for the purpose

of carrying out the trust imposed upon him as such assignee" for one month, paid the rent to plaintiff for that month, and then abandoned the premises, there being then more than nine months of the term of the lease still unexpired. The action is brought to recover the rent of the next month. The answer is simply a restatement of the same facts. The court below ordered judgment for defendant on the pleadings, and, from the judgment entered thereon, plaintiff appeals. In support of the judgment, defendant relies on the case of *Wilder v. Peabody*, 37 Minn. 248, (33 N. W. 852,) but we do not think the question here presented was in that case. That was simply an attempt to prove, as a claim against the insolvent estate, the installments of rent neither earned, due, nor payable under an unexpired lease. It was held that such rent was not an absolute debt against the insolvent, due in the future, but a mere contingent claim which might never become absolute, as the lease might be forfeited, surrendered, or otherwise terminated before the rent came due.

It is a well-established principle that an assignee for the benefit of creditors does not accept a leasehold interest by merely accepting the trust, and it is his duty to refuse to accept it, if it is of no benefit to the creditors; but, if he does accept it, he is liable personally for the rent while he holds the lease, the same as any other assignee holding a leasehold interest. If he refuses to accept such leasehold interest, the lease is not thereby surrendered to the landlord, but remains in the assignor.

It has long been a mooted question what acts on the part of the assignee amount to an election to take the lease. Such English cases as *Hanson v. Stevenson*, 1 Barn. & A. 303, and *Welch v. Myers*, 4 Camp. 348, hold that an assignee in bankruptcy may enter and remove the bankrupt's goods without thereby accepting the lease, but that if he continues the bankrupt's business, or sells the goods on the premises, it amounts to an acceptance of the lease. However, this was under a bankrupt law which provided that the bankrupt was not liable on the covenants in the lease after the assignee had accepted it. See *Copeland v. Stephens*, 1 Barn. & A. 593. Under such a provision, it might well be held that it was the duty of the assignee not to embarrass the landlord by his acts, but to act promptly in electing to accept or reject the lease, and that his acts would be construed most strongly against him. However, there are

other English cases which do not apply this strict rule. See *Wheeler v. Bramah*, 3 Camp. 340. There are several American decisions which follow the strict English rule, but most of them are in cases of common-law assignments.

Under an insolvency law such as ours, the assignee is an officer of the court; his powers and duties are defined by law, and not by the deed of assignment; he is more immediately under the control and protection of the court than the assignee of an assignment *in pais* or a common-law assignment, whose acts of use and occupation of the leased premises might be regarded more as the acts of a private party, and be construed more strongly against him. There are several American decisions which hold that such an assignee, an officer of the court, is analogous to an executor or administrator (*Journey v. Brackley*, 1 Hilt. 454; *Jermain v. Pattison*, 46 Barb. 9), and that in such a case, if the value of the land is less than the rent, and there is a deficiency of assets, the landlord can recover of the trustee only the profits which he received from the premises (3 Williams, Ex'rs, 1756-1759).

It is well settled that, in any case, the assignee of a lease may relieve himself from continuing to incur liability under it by assigning it, even to a beggar; so that the landlord has no vested right in a continuance of the assignee's liability during the life of the lease. But the courts ought not to be too ready so to construe the liabilities of its officers as to compel them to resort to such a subterfuge as this in order to escape such liability.

We are of the opinion that the mere fact that such an assignee goes upon the leased premises, and there performs his trust by selling the assigned goods, or even continuing the business a short time under the direction of the court, will not amount to an election on his part to take the lease, especially if no step is taken by the landlord or assignor to require him to elect; that, in any such case, the assignee may act in a reasonable manner without thereby incurring the liability of taking the lease.

If an executor waives a lease made to his testator, it amounts to a sort of a surrender to the landlord, but, if an assignee waives a lease made to the insolvent, it does not; the lease still remains in the insolvent until there is some act of forfeiture, as, for instance, nonpayment of rent. This being so, unless the assignee accepts the

lease there is no privity of estate between him and the landlord, and no action against him will lie, even for use and occupation, when he has thus temporarily used the leased premises in the performance of his trust.

But a court of equity having a fund in court sometimes acts on equitable rules, and recognizes equitable rights which could not otherwise be enforced, and it will recognize and allow such equitable claim for rent during the time the assignee used the premises as a part of the expense of performing the trust. *Journey v. Brackley* and *Jermain v. Pattison*, *supra*, and *White v. Thomas*, 75 Mo. 454.

The judgment appealed from should be affirmed. So ordered.

BUCK, J., absent, took no part.

(Opinion published 58 N. W. 689.)

NETTIE ROGERS *vs.* WILLIAM H. TRUESDALE.

Submitted on brief by appellant, argued by respondent, April 13, 1894. Affirmed April 20, 1894.

No. 8745.

"Negligently" in pleading.

The allegation in a pleading that an act is "negligently" done is an allegation of fact, and is generally sufficient without stating the particular details which go to make up the negligence complained of.

An allegation of negligence is not a statement of a mere conclusion of law.

Such general allegation of negligence is not a mere conclusion of law, unless there is a further statement of the acts or omissions claimed to constitute the negligence, from which it affirmatively appears that it puts the court in possession of all the exact details which go to make up the negligence.

Appeal by defendant, William H. Truesdale, Receiver of the Minneapolis and St. Louis Railway Company, from an order of the District Court of Waseca County, *Thomas S. Buckham, J.*, made August 19, 1893, overruling his demurrer to the complaint.

The plaintiff, Nettie Rogers, stated in her complaint that on June 28, 1888, the District Court of Hennepin County appointed defendant receiver of the Minneapolis and St. Louis Railway Company and authorized him to operate the road, that he accepted the trust and employed William B. L. Rogers as brakeman on a freight train running between Minneapolis and Albert Lea. That it was defendant's duty to have the cars carefully loaded and to make and enforce reasonable rules relative to loading and inspection of freight cars so that they could be transported with reasonable safety to the servants; that defendant negligently omitted to make or enforce such rules. The complaint further stated that on March 9, 1893, at Montgomery Station defendant negligently permitted a flat car to be so negligently loaded with cordwood that two green slippery elm ties were placed at one end of the car with the slippery side up and uncovered, while the cordwood was piled higher than the ties but not upon them, so that the brakeman in passing along the tops of the cars composing the train while it was in motion was obliged to step down from the wood upon the ties; that the ties were so hewn that the edges remained in their natural state, except that the bark was loose and partly off; that the car thus loaded was negligently placed in the train and taken south to Waseca; that while switching at that place Rogers was required to pass over this car of wood while it was in motion; that in doing so he stepped upon the elm ties then wet with rain and slipped and fell between the cars and was run over and killed; and that plaintiff his widow was on June 10, 1893, appointed administratrix of his estate. She brought this action as such administratrix to recover \$5,000 damages for the benefit of herself and his next of kin, pursuant to 1878 G. S. ch. 77, § 2. Defendant demurred to the complaint and specified as ground of objection that it did not state facts sufficient to constitute a cause of action. The court overruled the demurrer and defendant appeals.

A. E. Clarke and *W. F. Booth*, for appellant.

S. L. Pierce, for respondent.

CANTY, J. The complaint in this action alleges that plaintiff's intestate was a brakeman in the employ of defendant on a railroad

which he is operating as receiver; that defendant "negligently permitted a flat car to be negligently loaded" with cordwood, and two green slippery elm ties placed at one end of the car, lower than the cordwood, so that the brakemen in passing along over the cars in the discharge of their duty would be obliged to step down from the cordwood upon these ties; that these ties were so hewed that the edges remained in their natural state, except that the bark was loose and partly off, and that they were slippery, and dangerous to step upon; that this car, so loaded, was being hauled in defendant's train, and said brakeman, plaintiff's intestate, in the course of his employment, stepped down from the cordwood upon these ties, slipped, and fell from the car down between the cars of the moving train, which ran over and killed him.

The defendant demurred to this complaint on the ground that it does not state facts sufficient to constitute a cause of action, and appeals from an order overruling the demurrer.

It is claimed by appellant that the complaint does not show that the car was negligently loaded. The complaint alleges that the car was "negligently loaded." It is well settled that the word "negligently" is an allegation of the fact, and that it is generally sufficient, without stating the particular circumstances or details which go to make up the negligence complained of. The word "negligently" is not a mere conclusion of law, unless all the force is taken out of it by the further statement of the particular acts or omissions which constitute the negligence. But it must affirmatively appear that this further statement is so specific as to put the court in possession of all the exact details which go to make up the negligence.

There is a further statement in this complaint of the acts and omissions which constitute the negligence complained of, but we cannot say that it is thus specific. For instance, it does not affirmatively appear whether the slippery elm ties complained of were placed crosswise or lengthwise of the car, whether they lay in a horizontal position, or whether one end was much lower than the other. Whether this further statement of specific facts in this complaint shows a cause of action it is not necessary to decide. It does not affirmatively show that there is not a cause of action,

and it does not wholly supersede the general allegation of negligence.

We are of the opinion that the order appealed from should be affirmed. So ordered.

BUCK, J., absent, sick, took no part.

(Opinion published 53 N. W. 688.)

HANNORA LYTLE *vs.* NATHAN W. PRESCOTT *et al.*

Submitted on briefs April 4, 1894. Affirmed April 20, 1894.

No. 8658.

Assignments of error.

Assignments of error *held* bad.

Appeal by defendants, Nathan W. Prescott and John H. Doran, from an order of the Municipal Court of the City of St. Paul, *John Twohy, Jr., J.*, made September 8, 1893, denying their motion for a new trial.

John Olson bought of Nathan Ford Music Co., August 19, 1891, a music box in rosewood case for \$80 and gave his note for that sum and signed a contract that the instrument should remain the property of the vendors until the note should be paid. He afterwards paid \$42 on the note. On December 17, 1892, Olson borrowed of the plaintiff, Hannora Lytle, \$22 and gave her a mortgage on the music box to secure repayment. On April 4, 1893, Olson pawned the music box to the defendants for \$13.55. They kept a pawnbroker's shop. On April 9, 1893, plaintiff demanded the property, and commenced this action April 11, to recover possession by virtue of her mortgage. A jury was waived. The court made findings of fact and ordered judgment for plaintiff that she recover the property and in case she could not obtain possession then for \$22 and interest the value of her mortgage interest with costs. Defendants moved for a new trial but were denied and they appealed. In this court they assigned errors as follows:

First. The finding of the court is not justified by the evidence and is contrary to law. Second. There is no evidence in this case

v.57M.—9

57	129
84	84

to establish the damages as found by the court. Third. Court erred in denying defendants' motion for new trial.

B. F. Latta, for appellants.

John W. Best, for respondent.

GILFILLAN, C. J. Of the three assignments of error the first and third are bad under the rules,—the first, because it does not show whether it is taken to the court's findings of fact or its conclusion of law, and, if to the findings of fact, it does not show to which of them (there being several); the third, because it assigns as error the denial of the motion for a new trial, without specifying to which of the several points made by the motion the assignment applies. There is no merit in the second assignment of error. There was evidence to sustain the finding referred to in it. Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 688.)

GUST. LILLYBLAD *vs.* CHARLES F. SAWYER.

Argued by appellant, submitted on brief by respondent, April 16, 1894. Affirmed April 20, 1894.

No. 8579.

Evidence received held relevant to the issue.

In an action against defendant on a note which he signed as surety, and which he claims he signed at plaintiff's request, and which was given to the plaintiff as payee to renew or discharge a prior note held by a third party, on which plaintiff was liable, but defendant was not, and as to which defendant claims that plaintiff was the principal debtor, *held*, under the issues in this case, it was competent, as against defendant's objection, to admit evidence sufficient to show which of the parties to the last-named note were in fact the principal debtors, and which were in fact the sureties.

Findings supported by the evidence.

Evidence *held* sufficient to sustain the findings.

Appeal by Charles F. Sawyer, one of the defendants, from an order of the Municipal Court of the City of Minneapolis, *Stephen Mahoney, J.*, denying his motion for a new trial.

The plaintiff, Gust Lillyblad, and George W. Turnbull were partners in a supply business in Minneapolis. They borrowed \$300 at the Swedish American Bank and gave it their note for the amount. Lillyblad soon after sold his interest in the firm to C. A. Bennett. Then Turnbull and Bennett formed a partnership and took the assets and agreed to pay the debts of the old firm.

They renewed the note at bank and plaintiff at their request signed with them. On January 1, 1892, they took in defendant, Charles F. Sawyer as a third partner and each of the three was to have an equal share in the assets and the new firm agreed to pay the liabilities. This new firm was called the Northern Supply Company. In about fifteen days thereafter Bennett sold his interest in the firm to his partners and Sawyer and Turnbull became equal co-partners in the business under the same firm name taking the assets and assuming the liabilities of the previous firm. The note at bank fell due and was renewed for ninety days by a new note signed by Charles F. Sawyer and George W. Turnbull payable to plaintiff and indorsed by him. When this note fell due plaintiff paid the bank and took the note and brought this action upon it against the makers. Sawyer alone defended. He claimed that he never assumed to pay the debt to the bank and that he signed the note for the accommodation of Turnbull and plaintiff to assist them in settling their private matters in which he had no interest. A jury was waived. The judge made findings of these facts and ordered judgment for plaintiff against both defendants. Sawyer moved for a new trial but was refused and he alone appeals.

C. F. Sawyer and W. A. McDowell, for appellant.

Penney & Hayne, for respondent.

CANTY, J. This is an action brought on a promissory note made by defendants Sawyer and Turnbull to plaintiff. The defendant Sawyer answered that plaintiff and Turnbull represented to him that they were indebted to the Swedish American Bank in the amount of the note; that he signed the note in question at their request, and for their accommodation, before it was filled up; and

that they agreed to sign it and fill it up to the bank, and take care of it when due, and that it should be used to take up a note which the bank held against plaintiff and Turnbull.

On a trial before the court without a jury the findings and order for judgment for plaintiff were made and filed, and from an order denying a motion for a new trial defendant Sawyer appeals.

It was proved, against Sawyer's objection, that prior to September 3, 1891, plaintiff and Turnbull were in partnership in business, and gave to the bank a note for the amount of the note in suit; that on that day one Bennett bought the interest of plaintiff in the firm, and formed a partnership with Turnbull to continue the business, and the new firm for a valuable consideration agreed to pay this note; that afterwards, on October 29, 1891, this note was renewed by plaintiff and Bennett giving the bank their note, but the debt was still the debt of Bennett and Turnbull; that about January 1, 1892, Sawyer came into the firm, and Bennett went out in about fifteen days afterwards. The firm at this time was called the Northern Supply Company.

The admission of this evidence was not error. It became material to ascertain whether plaintiff was a principal debtor or a mere surety as to the debt due the bank. Sawyer, as surety for some one, signed a note, which was used to renew or discharge this debt, and, if plaintiff was one of the principal debtors, he could not recover of his own surety, whether that surety signed at his request or not.

The court found that Turnbull and Bennett were the principal debtors, and that Sawyer signed the note in suit at the request and for the accommodation of Turnbull, and that Turnbull did not sign the previous note himself, because the bank did not consider him responsible, and did not want his name on its paper; and we are of the opinion that there is sufficient evidence to sustain these findings.

The court does not find on the question of whether or not, as between himself and Sawyer, plaintiff continued to be a surety for the debt, or whether or not for such reason he should be allowed to recover only one-half the debt by way of contribution between sureties, and the question is not raised on this appeal.

There are no other assignments of error worthy of consideration, and the order appealed from should be affirmed. So ordered.

ANDREW NELSON *et al.* vs. ANNA LARSON.

Argued April 10, 1894. Affirmed April 20, 1894.

57	133
82	222

No. 8617.

No consideration for a promise to pay the debt of a deceased person.

In an action against the widow, who is the administratrix of the estate of her deceased husband, brought to recover of her the amount of a promissory note made by him to plaintiffs, on the ground that after his death she agreed to pay the note, and in consideration thereof they agreed to release his estate, *held* that, plaintiffs having failed to prove that they did so agree to release his estate, her promise to pay the debt is without consideration, within the statute of frauds, and void.

Appeal by plaintiffs, Andrew Nelson and B. P. Nelson, from a judgment of the District Court of Meeker County, *Gorham Powers, J.*, entered September 22, 1893, that they take nothing by their action.

Christensen & Tuttle, for appellants.

A conversation or agreement should be given the interpretation the parties intended for it, if that intention can be ascertained from the language and conduct of the parties. If the minds of the parties meet the particular form of the language is immaterial. *Pendill v. Neuberger*, 67 Mich. 562; *Brown v. Orland*, 36 Me. 376.

To ascertain the meaning of the words used orally between the parties is within the province of the jury and the case should have been submitted to them. *Burnham v. Allen*, 1 Gray, 496; *Hughes v. Tanner*, 96 Mich. 113.

The consideration was the release of the estate by not filing the claim in the Probate Court. The forbearance of a remedy is a good consideration. *Gaslin v. Pinney*, 24 Minn. 322; *Andreas v. Holcombe*, 22 Minn. 339.

Peterson & Kolliner, for respondent.

Although defendant agreed to pay this claim against the estate it appears that the plaintiffs agreed to nothing—absolutely nothing. They nowhere agreed to release the estate or to forbear fil-

ing this claim. Her promise was void for want of consideration. It was contrary to that provision of the statute of frauds which provides that "Every special promise to answer for the debt, default or doings of another must be in writing." *Sidle v. Anderson*, 45 Pa. St. 464; *Hester v. Wesson*, 6 Ala. 415; *Dillaby v. Wilcox*, 60 Conn. 71.

CANTY, J. The plaintiffs held the promissory note of one Andrew Larson, who died leaving the note partly unpaid. After the widow had applied for letters of administration, one of the plaintiffs had a conversation with her, in which it is claimed he told her he would have to file their claim in the Probate Court before he went to Europe. She answered that he need not; that she would pay it. "You shall not lose a dollar." She repeated several times that she would pay it, and that he need not file it in the Probate Court, and he answered her, "Then I do not need to bring it to the Probate Court?" and she answered, "No, sir." The plaintiffs, relying on her promise, did not file their claim against the estate until after the time for creditors to file claims had expired, and then they brought this action against the widow, alleging that they entered into an agreement with her whereby she agreed to pay to them the sum remaining due on the note, and in consideration thereof they "agreed not to file said note and claim in the Probate Court." On the trial the only evidence given to prove this agreement was the conversation above stated. When the testimony was closed, the court ordered a verdict for the defendant, and from the judgment entered thereon plaintiffs appeal.

Plaintiffs do not claim to recover on the theory that the defendant Anna Larson guarantied the payment of this debt, which would require a new consideration, and a written guaranty expressing that consideration, to take it out of the statute of frauds; but they claim against her on the theory that she became substituted as the debtor; that she promised to pay the debt, and in consideration thereof they agreed to release the estate of her husband.

There is sufficient evidence to show that she promised to pay the debt, but we are of the opinion that there is not sufficient evi-

dence to show that the plaintiffs in turn agreed to release the estate. His answer to her, "Then I do not need to bring it into the Probate Court?" is not an agreement on his part that he would not; and, if he had filed it in the Probate Court, this conversation would not have been sufficient to prove that plaintiffs had agreed to release the estate.

The judgment below should be affirmed. So ordered.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 687.)

JOHN A. THOEN vs. ROBERT ROCHE.

Argued April 16, 1894. Affirmed April 20, 1894.

No. 8555.

Reputation as evidence of Federal surveys of land.

The rule admitting evidence of common repute on the question of boundaries applies to the boundaries established by the United States surveys where the monuments set in making those surveys have disappeared.

Appeal by plaintiff, John A. Thoen, from an order of the District Court of Morrison County, *L. L. Baxter, J.*, made February 7, 1893, denying his motion for a new trial.

The defendant, Robert Roche, on June 17, 1875, purchased and has ever since owned and occupied the southeast quarter of section thirty one (31), T. 39, R. 30, in Morrison County. William Roche, defendant's brother, in April, 1878, purchased the northeast quarter of the same section. The line between the two quarter sections was surveyed in 1876 and a highway laid on the line as then located. William afterwards sold his land to the plaintiff and removed to Duluth. Plaintiff had the whole section resurveyed in 1890, by R. J. Batzer and found that it had been inaccurately surveyed originally and that the east half was a mile and thirty four rods long from north to south and contained three hundred and thirty four acres. The government quarter stake on

the east line of the section could not be located and the plaintiff's surveyor divided the half section equally between the two parties. This gave plaintiff a strip of land seventeen rods wide south of the road and he brought this action to recover possession of it. On the trial in March, 1892, the defendant called a witness named Morse who testified that in 1876, Garrison surveyed the road between the two quarter sections and located the east quarter post in the middle of the road, and it had always been recognized and understood by the people of the vicinity as the true location of the government quarter stake. Plaintiff duly objected to this evidence but was overruled and he excepted. Other witnesses also testified under objection to the same general reputation in the vicinity. Defendant had a verdict. Plaintiff moved for a new trial. Being denied he appeals.

Taylor, Calhoun & Rhodes, for appellant.

Unless the government monuments could be established, the line was as claimed by plaintiff. There is no dispute but what the line as located by Mr. Batzer is the correct line if the location of these quarter posts cannot be ascertained. To avoid the effect of this, defendant attempted to show that the government quarter stake was actually located further north and in the road. Defendant was allowed under the objection of plaintiff to show that the quarter post as located by Garrison years before, has always been recognized by the people in the vicinity as being the true location of the quarter post on the east side of the section.

The exact location of a purely private boundary cannot be shown by general reputation. This is the general rule as laid down by the leading text books on evidence. 1 Greenl. Ev., § 145; 1 Phillips Ev., § 230; Starkie Ev., 50; *Shutte v. Thompson*, 15 Wall. 151; *Chapman v. Twitchell*, 37 Me. 59.

Traditional evidence may be admitted in relation to the boundary of parishes, manors and the like, which are of public interest and generally of remote antiquity, but it is inadmissible for the purpose of proving the boundary of a private estate when not identical with one of a public nature. *Hunnicut v. Payton*, 102 U. S. 333; *Ellicott v. Pearl*, 10 Pet. 412; *Hall v. Mayo*, 97 U. S. 416.

There is no evidence tending to show an agreement between

the parties to the action regarding the line in dispute. The most that can be fairly claimed is, that there was a tacit understanding that the road was the correct line. They made no attempt to settle any dispute and no dispute existed. It was simply the ordinary case of mistake as to the location of the line. *Schraeder M. & M. Co. v. Packer*, 129 U. S. 688; *Hass v. Plautz*, 56 Wis. 105; *Cronin v. Gore*, 38 Mich. 381; *Kincaid v. Dormey*, 51 Mo. 552; *Reed v. McCourt*, 41 N. Y. 435; *Smith v. McNamara*, 4 Lansing, 169.

G. W. Stewart, for respondent.

However erroneous the original government survey may have been the monuments that were set must nevertheless govern, even though the effect be to make one quarter section contain much more than another. *McIver v. Walker*, 4 Wheat. 444; *Land Company v. Saunders*, 103 U. S. 316; *Chan v. Brandt*, 45 Minn. 93; *Cottingham v. Parr*, 93 Ill. 233.

In making a resurvey the question is not how an entirely accurate survey would locate the lines, but how the original surveys located them. If the actual location of the original land marks can be discovered they must govern. If they are not discovered, the question is, where were they located. And upon that question the best possible evidence is usually to be found in the practical location of the lines made at a time when the original monuments were presumably in existence and probably well known. *Diehl v. Zanger*, 39 Mich. 601; *Stewart v. Carleton*, 31 Mich. 270; *Smith v. Hamilton*, 20 Mich. 433.

A boundary line long recognized and acquiesced in, is generally better evidence of where the true line should be, than is a survey made after the original monuments have disappeared. *Tarpenning v. Cannon*, 28 Kans. 665; *Shaffer v. Weech*, 34 Kans. 595; *Reinert v. Brunt*, 42 Kans. 43; *Stewart v. Carleton*, 31 Mich. 270; *Gregory v. Knight*, 50 Mich. 61.

The quarter posts are made of perishable material which passes away with the generation in which they were made. By the improvement of the country and other causes they are often destroyed. It is therefore important in many cases that hearsay or reputation should be received to establish their location; but such testimony

must be pertinent and material to the issue between the parties. *Kinney v. Farnsworth*, 17 Conn. 355; *Ralston v. Miller*, 3 Rand. 44; *Cox v. State*, 41 Tex. 1; *Conn v. Penn*, Pet. C. C. 496; *Wendell v. Abbott*, 45 H. H. 349; *Great Falls Company v. Worster*, 15 N. H. 412; *Smith v. Powers*, 15 N. H. 546; *Moul v. Hartman*, 104 Pa. St. 43; *Boardman v. Lessees of Reed*, 6 Pet. 328; *Kramer v. Goodlander*, 98 Pa. St. 353; *Child v. Kingsbury*, 46 Vt. 47; *Wooster v. Butler*, 13 Conn. 309; *Whitehurst v. Pettipher*, 87 N. C. 179.

GILFILLAN, C. J. Ejectment. The matter at issue is the location of the boundary line between the northeast quarter, owned by plaintiff, and the southeast quarter, owned by defendant, of section thirty-one, this depending on the proper location of the quarter-section post on the east side of the section established by the United States survey. As is frequently the case, that post has disappeared. It appears that, some sixteen years before the trial, one Garrison, a surveyor, made a survey of the east and west line between the north and south half-sections, and, as he supposed, found where the quarter post of the United States survey had been, and set a stake there; also, that a public highway running through the town east and west was on or near the line between the north and south halves of the section.

The court below permitted, against objection, a witness who was with Garrison at the survey to answer the question, "Did you find, when you were making that survey with Mr. Garrison, the quarter post on the east side of section thirty one?" The answer to such a question was proper to go to the jury, for, whatever it might be worth, its value was to be tested by further examination as to details. Such posts are set with a view to their being found and recognized on future surveys, and the parties making such surveys may testify directly that they found them.

The court also admitted, against objection, evidence of common repute in the neighborhood that the stake set by Garrison located correctly the quarter-section post, and also of common repute that the location of the quarter post was right in the center of the highway. The questions as put to the witnesses were general as to time, and included the time down to the trial. The general objection

that it was incompetent did not point out with sufficient definiteness the objection that the questions included time after action brought. Had the attention of the court and opposite counsel been called to that objection, it might have been avoided by a slight change in the form of the questions. Where such is the case, the specific objection must be made.

There is considerable difference between the English and many American authorities in the application of the rule which admits evidence of common repute on the question of boundaries. The English decisions confine it to cases of boundaries that are matters of public or common interest, such as boundaries of counties, towns, parishes, or manors. Many American decisions go beyond this, some going so far as to apply the rule to cases of purely private boundaries, where no one has any interest in the question but the two owners of adjoining estates. Some of those are without the support of the reason for the rule. The rule rests on necessity, better evidence of the boundary having ceased to exist, and is justified on the theory that where many persons, members of a community more or less extensive, are interested in a common boundary, they will know where it is, and their common assent will prove what they know.

Boundaries and monuments for boundaries under the United States system of surveys come within the reason for the rule, and within its application, even under the English decisions. In the first place, the establishment of such boundaries is a public act, and not merely a private act or agreement between two owners of contiguous estates. In the second place, it may, and usually does, come to affect the interest of many persons. Thus, the location of the quarter-section post affects a boundary of eight quarter sections and thirty-two quarter-quarter sections. And, in the third place, highways are frequently laid out, and school districts may be established with reference to such boundary lines. We are therefore of opinion the evidence was competent.

The evidence as to an agreement between the plaintiff's predecessor in title and the defendant locating the line between them, and of acquiescence in, and building fences with reference to, the line so located, was not very full, but there was enough to authorize the jury in finding an agreement that would be binding within

the rule, as stated in *Beardsley v. Crane*, 52 Minn. 537, (54 N. W. 740.)

Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 686.)

BARDWELL-ROBINSON Co. vs. THOMAS M. BROWN *et al.*

Submitted on briefs April 25, 1894. Affirmed May 4, 1894.

No. 8680.

Answer held sham.

Held, that it clearly appears that the answer of the appellants was sham, and that it was not error in the court below to strike it out.

Appeal for delay—Costs.

Held, further, that this appeal is taken merely for delay, and for that reason three per cent. of the judgment to be entered in the court below should be allowed as additional costs, to be taxed and entered in that judgment.

Appeal by defendants, Thomas M. Brown and Charles C. Shapleigh, from an order of the District Court of Marshall County, *Frank Ives, J.*, made August 10, 1893, striking out their answer as sham.

The plaintiff, Bardwell-Robinson Company, is a corporation dealing in lumber at Minneapolis. The defendants, Thomas M. Brown and Charles C. Shapleigh are copartners and retail dealers in lumber at Stephen and at Hallock under the firm name of T. M. Brown & Co. This firm bought lumber of plaintiff and on December 28, 1892, gave plaintiff on account their note signed with the firm name for \$500 and interest due June 1, 1893. When it fell due the note was not paid and this action was brought thereon to recover the contents. Thomas C. Shapleigh was also made defendant with the appellants and the complaint alleged that he was a member of the firm. The three defendants answered jointly as follows:

The defendants answering the complaint of the plaintiff herein deny each and every allegation therein contained, except that de-

defendants admit that plaintiff is a corporation and doing business as stated in the complaint in this action, and that no part has been paid by defendants of such a note as that described in the complaint in this action. Wherefore defendants ask that this action be dismissed.

Plaintiff moved the court at chambers on notice to strike out the answer as against defendants, Thomas M. Brown and Charles C. Shapleigh, and for judgment against them. It presented a number of letters some in the handwriting of one of these defendants and some in that of the other, ordering lumber, enclosing the note, and when about to fall due asking renewal of it and stating inability to pay it promptly. These letters were all written on letter paper containing a printed head stating the firm name as T. M. Brown & Co. and the names of the members as T. M. Brown of Stephen and C. C. Shapleigh of Hallock. These defendants in opposition to the motion read only the affidavit of Thomas C. Shapleigh stating that he was not a member of the firm, that Charles was his son, and Brown his son-in-law, but that he had never been interested in the firm affairs. The court struck out the answer as to these two defendants and ordered judgment against them for the amount of the note with interest and costs and \$10 costs of the motion. It was permitted to stand as the answer of Thomas C. Shapleigh. As to him no relief was asked or granted. The other defendants appeal from the order.

William Watts, for appellants.

Brown & Carr, for respondent.

The practice is authorized by statute. 1878 G. S. ch. 66, §§ 265, 266. *Miles v. Wann*, 27 Minn. 56; *Keigher v. Dowlan*, 47 Minn. 574; *Stedeker v. Bernard*, 102 N. Y. 327.

CANTY, J. Plaintiff brought an action against the three defendants, alleging that they were partners, and that they made to plaintiff the note in suit. The defendants answered with a general denial. The plaintiff made a motion to strike out the answer as sham, and presented affidavits which furnished very strong proof that defendants Brown and Charles C. Shapleigh were partners, and made and delivered the note to plaintiff. The defendants op-

posed the motion only with affidavits that the defendant Thomas C. Shapleigh never was a partner in the firm. The court below struck out the answer as to Brown and Charles C. Shapleigh, and ordered judgment against them, and they alone appeal. They simply try to hide behind Thomas C. Shapleigh, and claim that his answer will protect them, although their answer is sham.

It is too well settled and understood in this state to require any argument or citation of statute or authority that the plaintiff may sue several as joint defendants, and recover judgment against a less number. We are of the opinion that, as to these two defendants, the answer was clearly and palpably sham.

We are of the opinion that this appeal was taken merely for delay, that the order appealed from should be affirmed, and that additional costs should be allowed, amounting to three per cent. of the judgment to be entered in the District Court, to be taxed and entered as a part of that judgment. So ordered.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 872.)

ELMER HALVERSON vs. CHICAGO, MILWAUKEE & ST. PAUL RAILROAD CO.

Argued April 20, 1894. Reversed May 4, 1894.

No. 8767.

Authority of a Section Boss.

It cannot be presumed that a section boss on a railroad has any more authority than what is necessary for the discharge of the duties ordinarily belonging to that position.

Statements of Section Boss not evidence of Value.

In a suit against a railroad company for the value of stock killed, the statements of its section boss as to the value of stock are not competent evidence of such value, unless it is proved that he had authority to bind the company by such statements.

Agency not proved by admissions of the supposed agent.

The declarations of an alleged agent, not a part of the *res gestae*, are not competent evidence of his authority.

Appeal by defendant, the Chicago, Milwaukee and St. Paul Railroad Company, from an order of the District Court of Fillmore County, *John Whytock, J.*, made September 11, 1893, denying its motion for a new trial.

The plaintiff, Elmer Halverson, owned and occupied a farm on the line of defendant's railroad near Peterson. There was a farm crossing on his land. The gate in the railroad fence on the south side of the track was defective. On August 19, 1892, two yearling colts belonging to plaintiff escaped through this gate onto the track and were killed by a passing train. He brought this action to recover their value. On the trial plaintiff was a witness in his own behalf and after objection by defendant was permitted to testify before the jury that John Johnson, the defendant's section boss, told him that the interest of the company required that he should state about what cattle were worth in such cases, that Johnson said the colts were worth and he would report them worth \$75 apiece. The jury found for the plaintiff and assessed his damages at \$140. Defendant moved for a new trial. Being denied it appeals and assigns as error the ruling of the Judge on the trial admitting this evidence.

Wells & Hopp, for appellant.

The plaintiff testified after objection that the section foreman told him that the colts were worth seventy five dollars each, and he would report them worth that. There is no evidence that the section foreman was authorized to place a value upon the colts which would be evidence against defendant. The rule is well settled that statements of this nature are not admissible. *Doyle v. St. Paul, M. & M. Ry. Co.*, 42 Minn. 79; *Wall v. Des Moines & N. W. Ry. Co.*, 88 Ia. —.

G. W. Rockwell, for respondent.

The evidence of what Johnson, the section foreman, said on the morning the colts were found injured was competent. It was his duty to report what cattle were worth in such cases. It being his duty to report the value of the animals, the value he fixed upon them, while not conclusive, was admissible evidence tending to show their value. Besides this conversation was at the time the accident was first discovered. It was when Johnson first found the

colts were injured and was so closely connected with the accident as to be a part of the *res gestæ*. *O'Connor v. Chicago, M. & St. P. Ry. Co.*, 27 Minn. 166.

CANTY, J. Defendant's railroad runs through plaintiff's farm. Two of his colts escaped through a broken and imperfectly fastened gate in the fence of defendant along its track, and were killed, and he brings this action to recover damages therefor.

The question of defendant's negligence and plaintiff's contributory negligence were for the jury, but we are of the opinion that there was an error in the admission of evidence.

Plaintiff was allowed to testify, against defendant's objection, that the section boss, Johnson, told him that the colts were worth \$75 apiece. There was no evidence that the section boss had any authority from the company to value the colts, or that the question of the valuation of the colts or the settlement of the loss was a part of his business, or within the scope of his authority. It is true that the witness stated that the section boss said that "the interest in the company required him that he should state about what the cattle were worth in such cases." But the declarations of an agent are not competent to prove his authority. 2 Greenl. Ev. (14th Ed.) § 63, note b.

It cannot be presumed that a section boss has any more authority than what is necessary for the discharge of the duties ordinarily belonging to his position. If he had any further authority, it should be proved by competent evidence. The admission of this testimony was error. *Wall v. Des Moines & N. W. Ry. Co.*, 89 Iowa, —, (56 N. W. 436;) *Doyle v. St. Paul, M. & M. Ry. Co.*, 42 Minn. 79, (43 N. W. 787.)

The order denying defendant's motion for a new trial is reversed, and a new trial granted.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 871.)

XAVIER TESSIER vs. TOWN OF LAKE PLEASANT.

Argued April 23, 1894. Affirmed May 4, 1894.

No. 8 59.

Liability of towns for support of paupers.

Where the statute provides that all applications for aid to paupers shall be made to the board of supervisors of the town, and they, or a committee appointed by them, shall grant such relief as they shall deem necessary, *held*, that the town cannot avoid liability merely because the application was made to the individual members of the board, and not to the board when in session, or as an organized body. *Held*, there is sufficient evidence to sustain the verdict in this action.

Appeal by defendant, the Town of Lake Pleasant, from an order of the District Court of Polk County, *Frank Ives, J.*, made March 19, 1894, denying its motion for a new trial.

The plaintiff Xavier Tessier was a resident of the Town of Lake Pleasant in Polk County. He was a renter on a farm there. Armenia De Mars came to his house in August, 1891, and made it her home and worked out most of the time as a servant in the houses of the neighbors. She left her trunk at Tessier's house and returned there in the intervals between her engagements at service for others. She was a distant relative of his wife and had no other relative in the state. She was taken sick in July, 1892, and became unable to earn anything. Plaintiff soon after notified two of the supervisors of the town and requested them to provide for her. In May, 1893, he commenced this action to recover of the town the reasonable value of her support for forty two weeks. He claimed it was worth six dollars per week. The town denied that Miss De Mars was a legal resident of the town and denied all other allegations in the complaint. The jury returned a verdict for plaintiff and assessed his damages at \$189. Defendant moved for a new trial, but was refused and it brings this appeal.

William Watts, for appellant.

A. R. Holston, for respondent.

v.57m.—10

CANTY, J. Plaintiff brings an action against the defendant town for the reasonable value and worth of the support of a pauper whom he claims had a settlement in said town, and whom the town refused and neglected to support. Plaintiff had a verdict, and, from an order denying a motion for a new trial, defendant appeals. The town is in Polk county, which has the town system of caring for the poor.

We are of the opinion that there was sufficient evidence that the alleged pauper was a pauper, had gained a settlement in the town, and sufficient evidence, on the other points raised, to sustain the verdict. At the time the pauper became sick, and a public charge, she was residing at plaintiff's residence; and he notified two of the three members of the town board of the fact, and demanded that the town take care of her. Laws 1889, ch. 170, § 3, provides that in such cases all applications for aid shall be made to the board of supervisors, and the board, or committees appointed by them, shall grant such relief as they shall deem necessary, etc. It is urged by defendant that because the application for aid was not made to the board as an organized body, or when in session, but only to its individual members, it was not an application to the board, within the meaning of the statute. We are not of that opinion. 1878 G. S. ch. 10, § 75, provides that the board shall meet annually on the Tuesday next preceding the annual town meeting, and at such other times as they deem necessary and expedient.

If it was necessary to apply at a meeting of the board, they could often avoid the liability of the town to furnish the aid required by law for nearly a year, by simply failing to hold any meeting but the regular annual meeting. When the liability of the town must arise out of the voluntary contract of the board, the members of the board, acting as individuals, cannot create such liability. But this is not such a case. Here the liability arises by virtue of the statute, not by virtue of the acts of the board. The board should have appointed the proper committee, as provided by statute, to grant relief in such cases, or, having failed to do so, on receiving notice, as individuals, of the necessity for action, should have procured a meeting of the board to be regularly called to take action in the matter. The town cannot avoid liability to third

persons by reason of the failure of its officers to do their duty. We find no other error in the record, and the order appealed from should be affirmed. So ordered.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 871.)

WILLIAM S. CONRAD *vs.* JACOB DOBMEIER.

Argued April 26, 1894. Affirmed May 4, 1894.

No. 8635.

New trial, for inadequate damages.

When the jury find a verdict in favor of the plaintiff which determines issues in his favor that entitle him to substantial damages, but the jury award him only nominal damages, *held* it is not error in the court below to set aside the verdict, and grant a new trial.

Appeal by defendant, Jacob Dobmeier, from an order of the District Court of Crow Wing County, *G. W. Holland, J.*, made August 9, 1893, granting a new trial under 1878 G. S. ch. 66, § 253, as amended by Laws 1891, ch. 80, for inadequate and insufficient damages appearing to have been given under the influence of passion or prejudice.

Bangs & Fisk and *True & Neal*, for appellant.

McClenahan & Mantor, for respondent.

CANTY, J. Plaintiff held a mortgage on a certain brewery, and the land on which it was situated. The mortgagor conveyed to defendant, and plaintiff foreclosed his mortgage. During the year of redemption the brewery was burned, reducing the value of the premises to a small part of the sum for which they had been sold on the foreclosure sale. Afterwards, and before the year to redeem expired, plaintiff and defendant entered into an agreement whereby plaintiff agreed to loan defendant \$1,000, and whereby defendant agreed to mortgage some real estate he owned in Dakota to plaintiff to secure the payment of the same, and also to build a brewery of

57 147
564 284

certain dimensions on the site of the former brewery; and plaintiff agreed, on full performance by defendant, to convey the foreclosed premises to defendant when the time to redeem expired, and to take back a mortgage for the amount of the indebtedness arising under said first-named mortgage. This agreement was made on the 29th of March, 1892, and, on the 22d of May following, defendant wrote plaintiff, refusing to build the brewery or perform the contract, and plaintiff brought this suit for damages. The jury on the trial found a verdict for plaintiff for one dollar. The court, on motion, granted a new trial, and defendant appeals.

We are of the opinion that there was clearly no abuse of discretion in setting aside the verdict. Plaintiff was entitled to substantial damages, or else he was not entitled to a verdict at all. The jury found all the issues in his favor except the amount of damages, and the court below did right in setting the verdict aside.

Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 870.)

WILLIAM B. MITCHELL *vs.* ALEXANDER CHISHOLM.

Argued by appellant, submitted on brief by respondent, April 18, 1894. Reversed May 4, 1894.

No. 8636.

Former erroneous judgment between the same parties conclusive in a new action.

Plaintiff made a bond for deed conditioned to convey to defendant the land in controversy by a quitclaim deed in fee simple, and the defendant gave his notes for the purchase money. In an action afterwards brought by plaintiff against defendant on one of the notes, defendant answered that plaintiff had no title to the land, and could not and would not convey the land to him in fee simple, and that the note was without consideration. On a trial on the merits, the court below ordered judgment for defendant, and judgment was so entered. Plaintiff then brought ejectment against defendant for the possession of the land, and the defendant, as a defense, pleaded the judgment in the former action. *Held*, that whether or not the answer in the former action stated any defense, and whether

57	148
57	156
57	148
58	309
57	148
60	23

or not defendant should have had judgment, it was conclusive between the parties that plaintiff had no title, that the contract required him to make title, that there was no consideration for the note given for the purchase price, and that the contract was in effect rescinded, and that, on surrendering possession, defendant was entitled to recover the part of the purchase price already paid.

Estoppel by contract.

That, notwithstanding that judgment, defendant is estopped in the ejectment action from denying plaintiff's title or setting up as a defense a paramount title acquired since he went into possession under the bond for deed.

Appeal by plaintiff, William B. Mitchell, from an order of the District Court of Stearns County, *L. L. Barter, J.*, made June 24, 1893, denying his motion for a new trial.

The plaintiff acquired tax titles to the east half of the northeast quarter of section eight (8), T. 122, R. 32, in Stearns County. One was based on the taxes delinquent prior to 1873. Another was on the taxes of that year and a third was on the taxes for the year 1877. Tax judgments were entered for each tax and the land sold and bid in for the state and the certificate assigned to the plaintiff. On July 21, 1880, plaintiff sold the land to defendant, Alexander Chisholm for \$400, took his five promissory notes for the amount, and gave him a bond in the penal sum of \$400 with the condition that if he (Mitchell) should make, execute and deliver to Chisholm a good and sufficient quitclaim deed of the land in fee simple free from all incumbrances except subsequent taxes, upon being paid \$400 according to the terms of the notes, then the obligation to be null and void, otherwise of force. Chisholm went into possession and paid three of the notes. He then refused to pay the note for \$100 next to fall due, claiming that plaintiff's tax titles were invalid for irregularities and defects in the tax judgments and sales. Chisholm then bought in and obtained the patent title from a third party and refused to surrender possession of the land. Mitchell brought an action in June, 1884, on the note for \$100 and Chisholm defended on the ground that Mitchell's tax titles were void and the note without consideration. A jury was waived and the evidence heard. The court without making any findings of fact ordered that defendant have judgment for his costs and disbursements, and in a note attached to the order said that the at-

torneys in the action agree that findings are unnecessary. Judgment was entered in that action February 20, 1888, pursuant to the order.

The plaintiff afterwards in April, 1892, commenced the present action of ejectment against Chisholm to recover possession of the land. The defendant for answer stated all the previous proceedings including the defects in plaintiff's tax titles, and set forth his patent title and the judgment roll in the former action on the note, and attached a copy of the bond given him by plaintiff, and asked that plaintiff be enjoined from making any further claim to the land. The plaintiff replied and the issues were tried January 27, 1893, before the court without a jury. Findings were made that defendant is in possession of the land and withholds it from plaintiff and that each and every other allegation in the complaint is not sustained by the evidence, and directing judgment that the plaintiff take nothing because the tax judgments on which his title rests are void for want of jurisdiction. Plaintiff moved for a new trial on the ground that the decision is not justified by the evidence. The application was refused and plaintiff appeals.

George W. Stewart, for appellant.

The plaintiff was entitled to judgment by reason of the estoppel which the matter set up in the answer worked against the defendant. The answer concedes that the defendant entered into possession under the bond. When a person enters into the possession of lands as a vendee under an executory contract of purchase and neglects to pay the purchase money or otherwise fails to comply with the terms of the contract, and the vendor brings ejectment against him for the recovery of the possession of the lands, he cannot dispute the title of his vendor, either by setting up an adverse title acquired, or an outstanding title in a third person. *Jackson v. Harter*, 14 Johns. 224; *Leshner v. Sherwin*, 86 Ill. 420; *Hill v. Winn*, 60 Ga. 337; *Jackson v. McGinness*, 14 Pa. St. 331; *Bush v. Marshall*, 6 How. 284; *Hicks v. Lovell*, 64 Cal. 14; *Graves v. White*, 87 N. Y. 463; *Quinn v. Quinn*, 27 Wis. 168; *Miller v. Larson*, 17 Wis. 624; *Hermans v. Schmaltz*, 7 Fed. Rep. 566; *Farmer v. Pickens*, 83 N. C. 549; *Johnson v. Spear*, 7 Wend. 401; *Wallace v. Maples*, 79 Cal. 433.

One who enters into possession of real property under an executory contract for the purchase of the same is a mere licensee, and he cannot hold adversely to his vendor until he has performed all of the conditions in the contract on his part. *Berry v. Stewart*, 22 Ala. 207; *Matter of Department of Parks*, 73 N. Y. 560; *Devyr v. Schaefer*, 55 N. Y. 446.

When a vendee is in possession of real property under an executory contract and fails to comply with the conditions of the contract and is made defendant in an action of ejectment brought against him by the vendor, he is estopped from disputing his vendor's title and from setting up an outstanding title in a third person to defeat its recovery. *Robertson v. Pickrell*, 109 U. S. 608; *Gilliam v. Bird*, 8 Ired. 280.

If the vendee is not content with the title offered him he must surrender possession of the land to his vendor. *Viele v. Troy & B. R. Co.*, 20 N. Y. 184; *Jackson v. McGinness*, 14 Pa. St. 331; *Biggle v. Boulden*, 48 Wis. 477.

Taylor, Calhoun & Rhodes, for respondent.

The question of title is *res judicata* between plaintiff and defendant. They made a contract for the sale from plaintiff to defendant of the land in controversy. Defendant executed to plaintiff his promissory notes for the purchase money and subsequently paid a portion of the notes. Afterwards learning that plaintiff had no title, he refused to pay the remainder of the notes. Plaintiff brought suit on one of the notes. Defendant answered that the only consideration for the note was the purchase price of this land; that plaintiff had no title and could convey none, and that the consideration had wholly failed. Plaintiff replied averring that he was the owner of the land and setting out as his title the identical tax titles relied upon in this case. That action was tried and a judgment entered on the merits. The only issue was as to plaintiff's title. That was the only question determined. The judgment in that action precludes an examination of the question of title in this action. *Doyle v. Hallam*, 21 Minn. 515; *Bazille v. Murray*, 40 Minn. 48.

The record in the action on the promissory note shows that it was plaintiff and not defendant who was in default. Chisholm tendered the full amount due and demanded a conveyance of the title. Mitchell offered simply a quitclaim deed without having title other than under the void tax deeds. He was required to convey good title. *Donlon v. Evans*, 40 Minn. 501; *Drake v. Barton*, 18 Minn. 462; *Gregory v. Christian*, 42 Minn. 304; *George v. Conhaim*, 38 Minn. 338.

A vendee in possession may buy an outstanding title to the premises and assert it against his vendors; otherwise, it might be asserted by the owner or a stranger might buy it and it would be lost to both. The only controversy which ought to arise between him and the vendor respects the payment of the purchase money. How far he may be bound to this by law or by the obligations of good faith is a question depending on all the circumstances of the case, and in deciding it all those circumstances are examinable. *Green v. Dietrich*, 114 Ill. 636; *Blight's Lessee v. Rochester*, 7 Wheat. 535; *Watkins v. Holman's Lessees*, 16 Pet. 25; *Boons v. Chiles*, 10 Pet. 177; *Green v. Couse*, 127 N. Y. 386.

CANTY, J. In July, 1880, plaintiff made to defendant, Chisholm, a bond for a deed of the land in dispute, conditioned that plaintiff would convey this land to Chisholm by "quitclaim deed in fee simple," on being paid the sum of \$400, for which Chisholm made to plaintiff five promissory notes, due at different dates. In April, 1884, plaintiff commenced an action in the District Court against defendant for the recovery of the amount due on the fourth note. The defendant answered, alleging that the only consideration for this note was the bond for deed, and that plaintiff never had any title to the land; that he purchased believing that plaintiff had title, and paid the first three notes; that he tendered to plaintiff the amount of the other two notes, the one in suit and the last one due, as a full performance of the contract on his part, and demanded that plaintiff convey the land to him in fee simple, but defendant refused to do so, or do anything but execute to defendant a quitclaim deed of the land, which defendant refused to accept. The plaintiff replied, admitting the making of the bond, the receiving of the

notes, the payment of the first three, and alleged that he had title to the land. On these issues the case was tried by the court without a jury in July, 1887, and the court "ordered that said defendant have judgment for his costs and disbursements." The court made no findings of fact, but stated in a footnote that the attorneys agreed that findings were unnecessary. On February 20, 1888, judgment was entered for defendant, pursuant to this order.

This is an action of ejectment commenced in 1892 for the recovery of the possession of the premises. The defendant answered, admitting that he is in possession, and pleaded all of the foregoing facts as a bar to this action. On the trial in the court below, without a jury, the court found that defendant is in possession, and that all of the other allegations of plaintiff's complaint are untrue, and ordered judgment for defendant, and, from an order denying a motion for a new trial, plaintiff appeals.

We will first consider what effect the judgment in the former action had on the rights of the parties in this action. No evidence was given in this suit of what the controversy was in that suit, except what appears from the pleadings and order for judgment. In the absence of fraud, an agreement to execute and deliver a quitclaim deed is a sufficient consideration for a promissory note. *Washington Life Ins. Co. v. Marshall*, 56 Minn. 250, (57 N. W. 658.) While the agreement was to convey the premises in fee simple, free of incumbrance, yet there were to be no covenants of warranty, and, while it is probable that the answer in that suit stated no defense whatever, the court must have held that it did, and must have found that plaintiff had no title to the land, and held that defendant was not estopped from making this defense, though he went into possession under the bond for deed, and that there was no consideration for the notes. It has sometimes been held, where the pleadings are as general and indefinite as they may be under some of the common-law forms, that the pleadings and verdict alone are not sufficient from which to determine what the exact controversy between the parties was, but this does not apply where the pleadings are as special and the allegations as specific as they are in that case. Again, it has often been held that, where some of the allegations or counts in an answer are good and others are bad, it will not be presumed that the defendant prevailed

on the bad counts or allegations, but this rule does not apply where there is but one count in the answer, and all the allegations in it are bad. If it sufficiently appears on what points the defendant prevailed, and he prevailed on the merits, whether right or wrong, the judgment in his favor is *res judicata* on these points.

It seems to us that, by reason of that judgment, it is now *res judicata* between these parties that the plaintiff had no title, that his contract required him to give the defendant a title, that there was no consideration for the notes given for the purchase price, that the contract between them was rescinded or at an end, and that, on surrendering possession, defendant was entitled to recover back the part of the purchase money already paid. But the defendant may be estopped from denying plaintiff's title in one kind of an action while he may not be in another.

The defendant now claims under a paramount title, acquired in 1883 or 1884, but it sufficiently appears that he went into possession of the premises three or four years before that, under this bond for deed. For this reason he is estopped, while he remains in possession, from denying the plaintiff's title, whether it is good or bad. Sedg. & W. Land Title, § 317. But while it must for this reason be held, for the purposes of this action, that defendant is estopped to deny the plaintiff's title, the court below has found that plaintiff has no title. This was error, for which a new trial must be granted.

Whether or not what was admitted by the pleadings in the former action sufficiently appears in this action,—that defendant paid plaintiff a part of the purchase price of the land,—we do not decide. Neither do we decide whether or not such payment gave him, as an equitable defense, the right to retain the possession until it is repaid, as decided in *Turner v. Murriott*, L. R. 3 Eq. 744. The court below made no findings on these matters, and for that reason they are not properly before us.

The order appealed from is reversed, and a new trial granted.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 873.)

Application for reargument denied June 5, 1894.

WILLIAM B. MITCHELL vs. JOHN CHISHOLM.

Argued by appellant, submitted on brief by respondent, April 18, 1894. Reversed May 4, 1894.

No. 8687.

Appeal by plaintiff, William B. Mitchell, from an order of the District Court of Stearns County, *L. L. Baxter, J.*, made June 24, 1893, denying his motion for a new trial.

The plaintiff acquired tax titles to the east half of the southeast quarter of section eight (8), T. 122, R. 32, in Stearns County and sold it to defendant, John Chisholm, for \$400, and took his notes. In all other respects the facts in this case are similar to those in the preceding case against Alexander Chisholm regarding the adjoining eighty acres.

George W. Stewart, for appellant.

Taylor, Cathoun & Rhodes, for respondent.

CANTY, J. This case being a part of the controversy in the foregoing case, *ante*, p. 148, (58 N. W. 873,) and involving the same questions, the order appealed from is reversed, and a new trial granted.

(Opinion published 58 N. W. 874.)

Application for reargument denied June 5, 1894.

JACOB BARGE vs. FREDERICK SCHIEK.

Argued April 18, 1894. Affirmed May 7, 1894.

No. 8599.

Construction of Contract.

A certain lease construed.

Appeal by defendant, Frederick Schiek, from a judgment of the District Court of Hennepin County, *William Lochren, Henry G. Hicks and Frederick Hooker, JJ.*, entered July 21, 1893, for the recovery of the possession of the premises in dispute.

On July 20, 1887, the plaintiff, Jacob Barge, owned the premises No. 49 Washington Avenue South in Minneapolis and had rented the adjoining building No. 47 of John Schulte who owned it and had a ground lease for ninety nine years of the lot on which it stood, but Schulte's lease to Barge had expired on July 15, 1887.

Barge claimed the right to a renewal of the lease from Schulte for five years more. On July 20, 1887, Barge entered into a contract or lease with defendant, Frederick Schiek, as follows:

This indenture made on the 20th day of July, 1887, by and between Jacob Barge of Minneapolis, Minn., party of the first part, lessor, and Frederick Schiek, of the same place, party of the second part, lessee, witnesseth:

That the said party of the first part, in consideration of the rents and covenants hereinafter mentioned, does hereby demise, lease and let unto the said party of the second part, and the said party of the second part does hereby hire and take from said party of the first part the following described premises, situated in the county of Hennepin and state of Minnesota, viz.: The first floor and basement in the rear part, or back of the barber shop, of that certain brick building known as No. 49 Washington Avenue South in said city of Minneapolis, and the basement and rear room of the adjoining building No. 47 on said Washington Avenue South.

To have and to hold the said premises, just as they are, without any liability or obligation on the part of said lessor to make any alterations, improvements or repairs of any kind in, on or about said premises, for the term of five years from this date, yielding and paying therefor the rent of three thousand dollars (\$3,000) a year, with the privilege to said lessee of another term of five years upon the same terms and conditions, except that the amount of the annual rent during such second term shall be determined (unless previously agreed upon in writing by the parties hereto) by three disinterested persons to be selected as follows: one by each of the parties to this lease, and the third to be selected by the two persons thus designated or appointed, and the decision of a majority of said three persons shall be binding upon both parties to this lease, their heirs and assigns.

And the said lessee does covenant to pay the said rent in equal monthly payments in advance, to wit: during the first five years the sum of two hundred and fifty dollars (\$250) on or before the first day of every month during said term.

The said lessee will keep said premises in a neat, clean and respectable condition including the water closets, and will keep the sidewalks in front and along said premises clear of ice or snow, or other obstructions, if such clearing shall be ordered or required by municipal authority. That said lessee will not make nor suffer any waste thereon or thereof, and will not assign nor underlet said premises nor any part thereof without the consent of the lessor, written and signed on the back of this lease.

Said lessee agrees to make all necessary repairs; also to furnish steam for the comfortable heating of the whole of said building No. 49, and also for the front office room (ground floor) of said building No. 47, and to keep the same at a fair temperature (about 70 degrees Fahrenheit.)

The letting of the leased ground above described as the basement and rear room of No. 47 is subject to the conditions following: The building No. 47 aforesaid has been leased by said Jacob Barge from one John Schulte, the first term thereof having expired on the 15th inst., and said Jacob Barge claims another term of five years from that date, but no longer, and his claim being disputed by said Schulte, Jacob Barge agrees to defend his claim for another term of five years in the courts of this state, including the Supreme Court, and to pay the rent under said "Schulte lease" during the time, to said Schulte or his assigns.

In case said Barge should be dispossessed by said courts he shall not be responsible in damages, but the rest of the rent of three thousand dollars (\$3,000) payable by said Schiek to said Barge during the first term shall continue the same without reduction.

In witness the said parties hereto have signed their hands and affixed their seals the day first above mentioned.

Jacob Barge. (Seal.)

F. Schiek. (Seal.)

On April 2, 1888, Barge bought of Schulte his building and the ground lease of No. 47 and obtained a conveyance thereof. Schiek was notified and knew of the purchase at the time. On July 1, 1892, Schiek surrendered and yielded up to Barge the basement and rear room of No. 47 and Barge accepted the surrender and took and retained possession thereof. On May 14, 1892, Schiek notified Barge in writing that he proposed to continue under the lease for a second term of five years and asked to have the rent determined by three disinterested persons, and nominated Matthias J. Bofferding as one of such persons and asked Barge to nominate another, expecting the two to appoint a third. But Barge denied the right of Schiek to have such renewal and refused to appoint an arbitrator or grant a renewal.

On July 28, 1892, Barge commenced this action against Schiek to recover possession of the premises No. 49. The complaint stated the foregoing facts and contained a copy of the lease. Schiek answered admitting these facts and the execution of the lease and claimed a renewal. He asked specific performance of the covenant to renew. Barge replied and moved the court for judgment upon the pleadings. Three Judges sat to hear the arguments. *Lochren* and *Hicks* united in the following decision. *Hooker* dissented.

The defendant asks judgment for specific performance of the agreement contained in the lease for its renewal for a second term

of five years, and claims that such agreement for renewal in the original lease related only to that part of the leased premises comprised in number 49 Washington Avenue South. And whether such agreement for renewal only related to the part of the leased premises comprised in number 49 is the pivotal question in the case; because, if the agreement to renew covered the premises in number 47 as well, the right of the defendant to renewal was lost by his voluntary surrender of that part of the leased premises on July 1, 1892. He could not give up a part of the leased premises, and compel an unwilling renewal of another part at an appraised rental.

The entire premises contained in number 47 and number 49 are grouped and leased together as a single holding in the original lease, at a single rental in money, and in further consideration of specified heating of other parts of the buildings by the defendant during the term, and the performance of other agreements by him. It is in no way divided or apportioned as between the several parts of the leased premises. The agreement for renewal follows in the lease immediately after the principal stipulations as to the first term, and is equally broad, and equally comprises in its language the entire leased premises. It contains no provisions looking to a separation of the leased premises, and renewal of the lease as to a part only. But such effect is sought to be spelled out of the subsequent clause in the lease which states that the building number 47 has been leased by Barge of John Schulte, the first term having expired July 15, 1887, and that Barge claims another term of five years, which claim is disputed by Schulte, and Barge agrees to defend his claim by litigation, and pay rent to Schulte. But it is agreed that, if Barge is dispossessed by Schulte, then two results shall follow: (1) Barge shall not be responsible to the defendant Schiek for any damages to him; (2) Schiek shall continue to pay to Barge the rent of three thousand dollars per year for the rest of the first term. If, through such dispossession by Schulte, Barge became unable to renew the lease for the second term, he was not to pay damages, and the provision went no further than to specify the rights and obligations of the parties during the balance of the first term. There was no provision for renewal as to the part of the premises in number 49. If Barge, from another than the specified cause, failed or was unable to renew, he would not be protected from damages. If he contracted to lease lands he did not own, his lack of title would be no defense. He must acquire the title and fulfill his contract, or pay damages. In this case he did acquire the title during the first term.

It seems impossible to find in the original lease, by any fair interpretation, an agreement on the part of the plaintiff to give a renewed lease of that part of the premises only which is comprised in number 49, or the terms upon which such a lease could be considered as provided for. It is true that the money part of the rent could be fixed by appraisal. But should the defendant under it furnish steam for heating only the whole of building number 49,

or also the specified parts of building number 47? And a like query arises in respect to the care of the sidewalks, and other matters specified. In order to warrant a judgment for specific performance, it must not only be clear that the parties actually made the very contract that is sought to be thus enforced, but that every and all the terms of the contract were agreed to. The court can neither make a contract for the parties nor supply terms which they have omitted or left doubtful. There must be judgment in favor of the plaintiff that he recover of the defendant the possession of that part of the premises described in the complaint as included in number 49 Washington Avenue South, and his costs and disbursements.

Judgment was so entered and defendant appeals. In the progress of the case several amended and supplemental complaints and demurrers thereto were interposed and allowed or overruled; none of them affected the point on which the case finally turned.

Grethen & McHugh and George R. Robinson, for appellant.

The contention of the defendant is that the lease severs and divides the two properties, that No. 47 was purely incidental to the main subject matter of the contract which was No. 49. However broad the language used may be, the obligation of the parties will be limited to those things which they intended to contract. *Platt v. Lott*, 17 N. Y. 478; *Long v. Fewer*, 53 Minn. 156; *Bell v. Bruen*, 1 How. 169; *Decker v. Furniss*, 14 N. Y. 611.

Defendant was entitled to a judgment enforcing a renewal of his lease. *Strohmaier v. Zeppenfeld*, 3 Mo. App. 429; *Hug v. Van Burkles*, 58 Mo. 202; *Ranlet v. Cook*, 44 N. H. 512.

Albert E. Clarke and Willbur F. Booth, for respondent.

The plaintiff leased to the defendant the two adjoining buildings known as 47 and 49 for a term of five years at a single rental of \$250 per month. This rental was not apportioned between the different parts of the property leased, but was entire; the property was leased as an entirety, and the contract was an entirety. The right to renew was a right to renew as to the identical property leased and the whole thereof, not as to a part of it. Near the end of the term the tenant surrendered part of it and demands the right to renew as to the other part. A landlord might have good reason for desiring to rent the whole property together. He cannot be

compelled to rent part to one person and part to another against his will.

MITCHELL, J. We have examined all of defendant's assignments of error, but it would be as useless to discuss them in detail as it would be tiresome to attempt to follow all the sinuosities of practice which obtained during the progress of this case.

The only assignments of error that have any substance, or at all go to the merits of the case, are those which relate to the construction of the provision in the lease, set up in the complaint, giving defendant "the privilege of another term of five years;" the vital question being whether it applies only to that portion of the leased premises described as No. 49 Washington Avenue South, or to the whole of them, including No. 47.

Our construction is that it has reference to the whole premises, leased as an entirety, and not to a part only. We have arrived at this conclusion on substantially the grounds stated in the memorandum of the majority of the trial judges, and which need not be here repeated. In addition to what is there said, we may add that the argument that the provision for a renewal of the lease did not include No. 47, because at that time plaintiff's estate or interest therein did not extend beyond the first term of five years, would apply with equal force in favor of the proposition that the original letting of No. 47 was not for five years, because it also appears that plaintiff's interest did not then cover the last five days of that term.

If the "privilege of another term" was of the entire premises it follows that, by voluntarily surrendering a part of them, the defendant, in the absence of any agreement to the contrary, waived his right to a renewal or extension of the lease. Indeed, the appellant does not dispute this proposition, his only insistence being that the provision for another term only applies to No. 49. Had plaintiff's title to No. 47 failed or terminated, so that he could only have renewed or extended the lease as to No. 49, a different question would have been presented; but it stands admitted by the pleadings that, before the five-years term had expired, plaintiff, in order that he might be able to perform his covenants, purchased a long-term lease of No. 47, of which fact defendant had notice before he surrendered it to plaintiff.

We have not stopped to consider whether the stipulation is to be construed as one for a renewal by the execution of a new lease, or one for the continuance of the old lease, which should stand as the lease for the extended term, for the reason that we do not think the question material. In either case the option was of the whole premises, and not of a part.

Judgment affirmed.

BUCK, J., absent, sick, took no part.

CANTY, J. I dissent. The lease from Barge to Schiek, dated July 20, 1887, by its terms leases to Schiek the premises No. 49, and the basement and rear room of the adjoining premises, No. 47, for five years at a certain rent, with the privilege to said lessee of another five years upon a rent to be fixed by arbitration. Inserted in a subsequent part of the lease is the following provision:

"The letting of the leased ground above described as the basement and rear room of number 47 is subject to the conditions following: The building No. 47, aforesaid, has been leased by said Jacob Barge from one John Schulte, the first term thereof having expired on the 15th inst., and said Jacob Barge claims another term of five years from that date, but no longer, and, his claim being disputed by said Schulte, Jacob Barge agrees to defend his claim for another term of five years in the courts of this state, including the Supreme Court, and to pay the rent under said Schulte lease during the time to said Schulte or his assigns. In case said Barge should be dispossessed by said courts, he shall not be responsible in damages, but the rest of the rent of three thousand dollars (\$3,000.00), payable by said Schiek to said Barge during the first term, shall continue the same without reduction."

Here Barge plainly states that his own title to No. 47 lacks five days of continuing as long as the lease to defendant, Schiek, and even for that time his claim to it is in dispute, and he incurs no liability except to defend it in the courts, and, if he does so, shall not be responsible for damages if he is dispossessed, but the rent "payable by said Schiek to said Barge during the first term shall continue without reduction." Does not this fairly imply that, dur-

ing the second term of the lease to Schiek, there may be a reduction on account of the loss of 47? How much reduction would be a question for the arbitrators. Is it not fairly to be understood from this unskillfully worded lease that Barge does not and cannot rent Schiek the premises No. 47 for the second term at all? Can there be any doubt, from the reading of the whole instrument, that this is the meaning of the parties?

"The letting of the leased ground above described as the basement and rear room of number 47 is subject to the conditions following." What conditions is it subject to? The condition that Barge has only a limited interest in No. 47, which may fail even long before the end of the first five years. What letting is subject to these conditions? The letting for the first five years, or the whole ten years? Can there be any doubt as to the meaning of the parties on this point? When the different parts of this lease are construed together, the meaning of the parties is obtained by inserting after the description of No. 47, where it first occurs in the lease, the provision specifying the extent of the interest of Barge and the rights of Schiek in No. 47, as first above quoted. Then follows the clause of leasing for five years, with the privilege of five years more.

The lease is poorly drawn, and it may be suspected that it was drawn on a printed blank which did not have space enough at the proper place to insert at length the extent of Barge's interest, and the rights to be given Schiek, in No. 47, but the meaning is the same as if these things were there inserted.

It is not a new rule of construction which interprets a poorly drawn and inaptly worded instrument according to the real meaning of the parties when that meaning can be gathered with reasonable certainty from the face of the instrument by construing its different parts together and when a more strict and literal interpretation of it would defeat the intention of the parties, and work out results not contemplated by them. This lease must be construed in the light of the conditions that existed when it was made. The lessor cannot, by subsequently acquiring a greater interest in No. 47, procure a different construction.

But whatever difficulty there was in construing the lease as originally drawn, it seems to me the parties have removed that difficulty by the surrender as to No. 47. That surrender was not a

mere abandonment by Schiek, but a mutual and executed contract, by which No. 47 was taken out of the lease,—taken out of it not only for the remainder of the first five years, but also for the second five years. It cut the leased part of No. 47 out of the description of the leased premises for all future purposes. It seems to me that it is a vital point in this case that the provision in the lease giving Schiek an option of a second term of five years is not a covenant for renewal, which would require him to invoke the aid of a court of equity in an action for specific performance, in which he might be defeated by one of the very technical defenses peculiar to that action but it is a covenant for extension of the original lease at his option, which, when he exercises the option, gives him a legal estate for the whole ten years, without any other act. This distinction is discussed at length, and the authorities cited, by Dixon, C. J., in *Orton v. Noonan*, 27 Wis. 277. "It (the extension of the lease) gives to the lessee or tenant what he claims, and by a more indefeasible title." *Id.* 282.

The language of this lease is, "with the privilege to said lessee of another term of five years," and, when the option is exercised, it is an extension of the original lease, and requires no new writing, but operates as a continuous lease. *Orton v. Noonan*, 27 Wis. 283. See, also, *Taylor, Landl. & Ten.* (8th Ed.) § 332. The option being exercised, the second five years of this estate are as invulnerable as the first five years, and have all the attributes of a vested legal estate in possession, which will not be defeated or affected by any such slight uncertainty or deficiency in the terms of the contract, or any such slight doubt as to the meaning of the parties, as will defeat an action for specific performance of a mere executory contract. Whether the surrender of the premises No. 47 would defeat the specific performance as to No. 49 of a mere covenant for renewal of the lease, as assumed by the majority of the court below, the distinction as to which the majority of this court deems immaterial, it is not necessary to inquire. On well-established principle this is not such a case. On the contrary, it is a case where the second five years is as much a vested legal estate in possession as the first five years, and can no more be defeated by the surrender of a part of the premises than could the balance of the first five years left after such partial surrender. If in such a case

the leased premises are severable during the first five years, they are equally so during the second five years.

The judgment appealed from should be reversed.

(Opinion published 58 N. W. 874.)

SUSAN R. EASTMAN *vs.* GEORGE VETTER.

Submitted on briefs April 20, 1894. Affirmed May 7, 1894.

No. 8835.

Notice to end tenancy from month to month.

A tenancy at will from month to month, rent payable monthly, can only be terminated by one month's notice. 1878 G. S. ch. 75, § 40.

Form of the notice to end tenancy.

Notice by the tenant that he surrenders possession on the day on which the notice is given will not terminate the tenancy on the expiration of one month from that date.

Appeal by defendant, George Vetter, from an order of the District Court of Hennepin County, *Henry G. Hicks, J.*, made February 17, 1894, denying his motion for a new trial.

On July 26, 1883, plaintiff, Susan R. Eastman, leased to James Rickey the six story building Nos. 412 and 414, Nicollet Avenue, Minneapolis, for the term of five years from that date with the right to have the lease extended for two additional terms of five years each and with the privilege of subletting any portion of the building. Rickey agreed to pay \$659.90 rent per month on the first day of each month. On February 28, 1888, Rickey sublet to defendant, George Vetter, Room No. 412 and the basement under the front of the same for a fur store from that date to July 26, 1893, and Vetter agreed to pay as rent therefor \$250 per month payable monthly in advance on the first day of each month during the term. He entered and occupied the premises under this lease. In May, 1888, Rickey orally assigned to the plaintiff all his rights under the lease with Vetter and thereafter Vetter paid the rent to her as it fell due until the expiration of his term. Rickey did not renew

his lease with Mrs. Eastman. Vetter continued to occupy the premises after July 26, 1893, for the remaining five days in July and for the month of August, 1893, and paid rent at the same rate to October 1, 1893. On August 31, 1893, Vetter vacated the premises and sent the keys to plaintiff with the following notice:

"Enclosed are the keys to store No. 412 Nicollet Ave., which are hereby turned over to you and you now have possession of said store and premises this August 31, 1893."

On the same day plaintiff replied as follows:

"The keys of store No. 412 Nicollet Ave., tendered to me this afternoon by Mr. Eichelzer, and which I refused to accept, are at your disposal, and I shall look to you for the rent of the premises."

This action was to recover \$500 rent for the months of October and November, 1893. At the trial on January 5, 1894, the foregoing facts appeared and the Judge directed the jury to return a verdict for the plaintiff for the sum claimed. Defendant excepted. The verdict was entered and defendant moved for a new trial. Being denied, he appeals.

Charles P. Barker, for appellant.

Rickey could not lease beyond his own term. The character of the tenancy is determined at the day of entry. The alleged lease to Vetter was void, and he was a tenant at will from month to month. *Donahue v. Chicago B. N. Co.*, 37 Ill. App. 552; 1878 G. S. ch. 41, § 10; *Johnson v. Albertson*, 51 Minn. 333; *Weed v. Lindsay*, 88 Ga. 686; *Crommelin v. Thiess*, 31 Ala. 412; *Sinclair v. Jackson*, 8 Cow. 543; *Fall v. Moore*, 45 Minn. 515.

The law of landlord and tenant is largely judicial legislation and therefore subject to a reasonable application to the facts in each particular case. The defendant vacated the premises before he served the notice. He delivered the keys to plaintiff and paid the rent of \$250 for the succeeding month of September. He thereby gave her a month's notice of his intention to end the tenancy.

M. P. Brewer, for respondent.

Vetter was either the tenant of the plaintiff under the written lease or in the language of his counsel he was a tenant at will from month to month, and if the latter the tenancy arose from

implication and not from express contract. There was either a valid written lease for five years or there was a tenancy from month to month by implication from the acts of the parties in paying and accepting rent. *Johnson v. Albertson*, 51 Minn. 333.

Upon the tenant's own theory of the case, that he was a tenant at will from month to month, his liability in this action for the rent remains. Such a tenancy could only be terminated by the notice provided by statute. 1878 G. S. ch. 75, § 40.

The notice did not purport to be given for the purpose of terminating the tenancy and did not fix any date for termination of the tenancy other than August 31, 1893, that being the date upon which it was given. 1 Wood, Landlord & Tenant, § 39; *Steward v. Harding*, 2 Gray, 335; *Oakes v. Munroe*, 8 Cush. 282; *Boynton v. Bodwell*, 113 Mass. 531; *Elliott v. Stone*, 12 Cush. 174.

MITCHELL, J. Defendant's contention is—and it is the view of the law of the case most favorable to him—that he was holding under the plaintiff as tenant at will from month to month, rent payable monthly. Such a tenancy could only be terminated by one month's notice in writing. 1878 G. S. ch. 75, § 40.

The notice given by defendant was to the effect that the tenancy was terminated on the very day it was given.

Such a notice was clearly insufficient. It did not terminate the tenancy on the day named, and could not, by mere lapse of time, become effectual to terminate it on some other and later date.

A notice of this kind is a distinct act, which must be sufficient and complete of itself, without reference to subsequent events or proceedings. Had plaintiff, instead of defendant, sought to terminate the tenancy, and the former had served on the latter a notice to quit immediately, she could not have maintained an action for possession, although a month had elapsed after service of the notice and before the commencement of the action. But it can make no difference which party attempts to terminate the tenancy. *Grace v. Michaud*, 50 Minn. 139, (52 N. W. 390;) *Oakes v. Munroe*, 8 Cush. 282.

All that it is necessary to say as to defendant's counterclaims is that, waiving the question of the doubtful sufficiency of both the answer and the assignments of error, defendant's "offers" were

all properly excluded because each of them was, in part at least, incompetent.

Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 989.)

FRANK SLAMA *vs.* CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY. CO.
AND CHICAGO, MILWAUKEE & ST. PAUL RY. CO.

Submitted on briefs May 1, 1894. Affirmed May 7, 1894.

Nos. 8778, 8779.

Costs allowed to each of the defendants in an action for tort.

Where several defendants in an action of tort, in good faith, appear by separate attorneys and interpose separate defenses by separate answers, each is entitled, on a recovery in his favor, to a separate bill of costs.

Fees of witness who did not testify.

It appearing that the attendance of witnesses had been obtained in good faith, with the expectation that their testimony would become material on the trial, and their not being called being satisfactorily explained, *held*, that the affidavits of defendants as to their materiality were sufficient, in the absence of any contrary showing on part of the plaintiff.

Appeal by plaintiff, Frank Slama, from a judgment of the District Court of Ramsey County, *Charles D. Kerr, J.*, entered January 20, 1893, for costs.

The line of railway from St. Paul to Mendota is owned jointly by the defendants, the Chicago, St. Paul, Minneapolis and Omaha Railway Company and the Chicago, Milwaukee and St. Paul Railway Company. It is kept in repair by the first named company, but at the joint expense of both. Plaintiff was on June 16, 1892, and long had been in the employ of the first named company at work for it on the line of road keeping it in repair. On that day there was a washout near Mendota and the track torn away and freight cars wrecked therein. A wrecking train arrived and was engaged that night with cable in hauling out some of the wreckage.

Plaintiff was present assisting. The cable broke and one end struck plaintiff, injuring him severely. He brought this action against the two railway companies to recover damages, claiming that his injuries were caused by the joint negligence of both. Each company answered separately denying negligence and alleging plaintiff's contributory negligence and that of his fellow servants. Each company separately prepared for the trial and procured the attendance of witnesses. The case was on trial four days before a jury. At the close of plaintiff's evidence the court on motion of the defendants dismissed the action on the merits. Each defendant made its separate bill of witness fees and other disbursements and gave notice of taxation. The plaintiff appeared and filed objections but the clerk taxed \$51.23 for one company and \$66.67 for the other. Plaintiff appealed from the clerk's taxation to the Judge who presided at the trial and he affirmed the taxation, saying:

"The court taking judicial notice of its files and records, knows that this case after the trial had proceeded four days was dismissed by the court at the close of plaintiff's case on the ground that no cause of action had been established. From this it sufficiently appears without further proof why the defendants' witnesses were not called upon to testify in the case.

"In order to collect witness fees it is not necessary that the witness should have been subpoenaed or that his fees or mileage should have been actually paid. It is sufficient that the witness was in attendance at the request and in behalf of the successful party who on that account incurred the liability to pay the fee and mileage of such witness.

"The affidavit on behalf of one of defendants as to the residence of the witness Erickson in Dakota and with reference to the place where he entered the State of Minnesota in coming to the trial, follows the language of the statute in that regard, and is sufficient. *Merriman v. Bowen*, 35 Minn. 297. Courts take judicial notice of the divisions of the country into states, counties, cities, and towns and of distances of one city from another."

Judgment was thereupon entered against the plaintiff that the Chicago, St. Paul, Minneapolis and Omaha Railway Company recover of him \$51.23 and that the Chicago, Milwaukee and St. Paul

Railway Company recover of him \$66.67 costs and disbursements taxed and allowed to each. From this judgment the plaintiff appeals.

Humphrey Barton, for appellant.

S. L. Perrin, for Chicago, St. P., M. & O. Ry. Co.

W. H. Norris and *F. W. Root*, for Chicago, M. & St. P. Ry. Co., respondents.

MITCHELL, J. It was held in *Barry v. McGrade*, 14 Minn. 286, (Gil. 214,) that in an action of tort against several defendants where the defendants, who prevail, rely upon the same defense, unite in the same answer, appear by the same attorney, and there is but one trial as to all, they are entitled jointly, and not severally, to statutory costs.

The converse of this is equally true, viz. that where the several defendants in good faith interpose separate defenses by separate answers, and appear by different attorneys, each is entitled, on a recovery in his favor, to a separate bill of costs.

We think the taxation of witness fees should be affirmed for substantially the reason given by the trial judge in his memorandum. The affidavits showed that the attendance of these witnesses had been obtained in good faith, with the expectation that their testimony would become material on the trial. Why they were not called was satisfactorily explained by the fact that the action was dismissed when the plaintiff rested. We think defendants' affidavits made a sufficient showing of the materiality of the witnesses, in the absence of any showing to the contrary by the plaintiff, or of anything in the case raising a suspicion that they were called unnecessarily, or for the purpose of swelling the bill of costs.

Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 989.)

ANDREAS C. HAUGEN vs. OSCAR YOUNGGREN.

Argued April 24, 1894. Affirmed May 7, 1894.

No. 8817.

Verdict supported by the evidence.

Evidence *held* to justify the verdict.

A request to charge construed.

A certain "request" considered, and *held* not to amount to an instruction that exemplary damages could not be awarded.

Appeal by defendant, Oscar Younggren, from an order of the District Court of Kittson County, *Frank Ives, J.*, made August 19, 1893, denying his motion for a new trial.

The plaintiff, Andreas C. Haugen, lived on a homestead claim in the town of Red River in Kittson County with his family, and in the year 1889 raised thereon 325 bushels of wheat and 51 bushels of barley. C. J. McCollom and A. P. T. Suffel recovered judgment against him September 6, 1889, in the District Court for \$130.19. They obtained a writ of execution thereon and placed it in the hands of the defendant who was sheriff of that county and directed him to levy on the grain. He did so November 6, 1889, and sold the wheat for thirty five cents per bushel and the barley at sixteen cents per bushel. He retained \$34.34 for his fees and expenses and applied the balance \$87.57 upon the judgment.

Plaintiff brought this action against the sheriff to recover damages for taking this grain, claiming it was his only feed for his exempt stock and for his family, five children, and his only seed grain for the next year and was exempt from levy and sale on execution. Defendant answered that plaintiff had left the state and that the grain was subject to levy. Plaintiff replied that he was only absent a short time on account of sickness. At the trial March 17, 1893, defendant requested the judge to charge the jury as follows:

"If the jury find that the sheriff levied on exempt property, they must use as a measure of value the actual market price of wheat at the time it was taken, as there is no evidence of wantonness on the part of the sheriff at the time of making this levy."

The Judge refused; and defendant duly excepted. The jury re-

turned a verdict for plaintiff and assessed his damages at \$239. Defendant moved the court to grant a new trial of the action on the grounds (1st) that the verdict is not justified by the evidence and is contrary to law, (2nd) that errors in law occurred on the trial which were excepted to by him. The motion was denied and he appeals.

Alley & Konzen and William Watts, for appellant.

The jury awarded as damages more than the value of the grain at the time it was taken, with interest. There is no evidence whatever that will justify punitive damages in this case. *Seeman v. Fee-ney*, 19 Minn. 79; *Carli v. Union Depot, St. Ry. & T. Co.*, 32 Minn. 101; *Derby v. Gallup*, 5 Minn. 119; *Murphy v. Sherman*, 25 Minn. 196.

The trial court erred in refusing to charge the jury as requested.

H. Steenerson, for respondent.

If an officer levies upon property knowing it to be exempt that fact may go in aggravation of damages. *Lynd v. Pickett*, 7 Minn. 184.

The defendant's request was properly refused for the reason that it does not confine the market value to the place of taking; and the court had already covered the same point and treated it accurately in its general charge.

MITCHELL, J. Action for the wrongful seizure and sale of exempt property (grain) on execution. No case was made for the recovery of either special or exemplary damages, hence all that plaintiff was entitled to recover, under any circumstances, was the value of the property, with interest from the date of the wrongful taking. The evidence on some points was not of the most satisfactory nature, and the case was rather loosely tried and submitted, but we are of opinion that the question whether the grain was exempt was one for the jury; and, after careful computation of quantities and values testified to, we are compelled to the conclusion that, including interest for the three years and almost a half that elapsed between the seizure and the trial, the amount of damages awarded is justified

by the evidence, although we would have been better satisfied had it been smaller.

The only legal question of any importance in the case arises upon the refusal of the court to instruct the jury that, "if they found that the sheriff levied on exempt property, they must use as a measure of value the actual market price of wheat at the time it was taken, as there is no evidence of wantonness on part of the sheriff at the time of making the levy." If this instruction was intended to furnish the basis on which the jury should fix the value of the grain, it was incomplete, because it was not limited to the place of taking. But, as indicated by his argument here, the object of the request was to exclude the allowance of exemplary damages. We do not think that the request as framed fairly presented that question, or would have necessarily suggested it to the mind of the court. The only part that is at all suggestive of the point is the last clause, which is merely argumentative in form. Neither do we find anything in the record indicating that exemplary damages were claimed, or even suggested, on the trial; and the amount of the verdict is not such as to show that any such damages were awarded.

Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 988.)

OBED P. LANPHER *vs.* AUGUSTUS K. BARNUM.

Argued May 2, 1894. Affirmed May 7, 1894.

No. 8742.

Privilege given to declare a debt due, construed.

A stipulation in a promissory note construed as authorizing the holder, upon a certain default, to declare the principal sum due and payable for all purposes, and not merely for the purpose of a remedy on the mortgage given to secure the same.

Appeal by defendant. Augustus K. Barnum, from an order of the District Court of Ramsey County, *Hascal R. Brill, J.*, made October 11, 1893, overruling his demurrer to the complaint.

On December 22, 1891, Albert F. La Belle made and delivered to Thomas Brian his note by which he promised to pay to the order of Brian \$6,000 three years thereafter with interest at the rate of eight per centum per annum payable semiannually represented by six coupons each for \$240. The note contained a further provision as follows:

"If any or either of said annexed coupon notes shall remain unpaid for ten days after maturity thereof, I expressly agree with the payee of this note, that he or his assigns or other holder of this note, may at his or their option and without notice to the maker, declare the said principal sum, as well as any or either of said past due coupons, as fully due and payable as fully as if this note was payable on demand, and may proceed and collect the same, by foreclosure of the mortgage given to secure the same, either under the power of sale therein contained or by suit or other proceeding in court, or otherwise as he may elect."

The defendant, Augustus K. Barnum, for value received guarantied the payment of the principal and interest and indorsed such guaranty upon the note and upon each coupon note as follows:

"For value received I hereby guarantee payment of the within note and hereby waive presentment, demand, protest and notice of protest and diligence in collecting; and promise to pay all costs, expenses and attorney's fees paid or incurred in collecting the same."

The note and coupons were secured by a mortgage of real estate. Thomas Brian sold and transferred the note, coupons and mortgage to the plaintiff, Obed P. Lanpher. The coupon note payable June 22, 1893, fell due but was not paid. In August, 1893, Lanpher declared the debt to be due and commenced this action against Barnum on his guaranty to recover the \$6,000 and the accrued but unpaid interest. Defendant demurred to the complaint and specified as ground of objection that it did not state facts sufficient to constitute a cause of action, claiming that the note does not give the holder a right of action against the maker for the \$6,000 until the expiration of three years from its date; that the only means given for the collection of the principal sum before maturity is foreclosure of the mortgage. The trial court overruled the demurrer and defendant appeals.

Horton & Denegre, for appellant.

F. M. Callin, for respondent.

MITCHELL, J. The defendant guarantied payment of a note, with six interest coupon notes attached, executed by one La Belle, and payable December 22, 1894.

The note contained a provision that, "if any or either of said annexed coupon notes shall remain unpaid for ten days after maturity thereof, I expressly agree with the payee of this note that he or his assigns, or other holder of this note, may, at his or their option, and without notice to the maker, declare the said principal sum, as well as any or either of said past-due coupons, as fully due and payable as if this note was payable on demand, *and may proceed and collect the same by foreclosure of the mortgage given to secure the same, either under the power of sale therein contained, or by suit or other proceeding, in court or otherwise, as he may elect.*"

One of the coupon notes having remained unpaid for ten days after maturity, the plaintiff brought this action for the full amount of the note, as presently due and payable.

The question in the case is whether this provision authorized the plaintiff to declare the principal sum to be due and payable generally, for all purposes, or only for the purpose of remedies on the mortgage.

We have had occasion recently, in *White v. Miller*, 52 Minn. 367, (54 N. W. 736,) to consider the effect to be given to provisions of somewhat similar character in mortgages, but where the notes themselves contained no such stipulation. These are reasons, founded largely on considerations of policy, why such stipulations should be construed as relating only to the remedy on the mortgage, which would not apply where the stipulation is in the note itself.

The defendant's contention is that the clause italicized limits what precedes to the purpose of appropriating and applying the mortgage security. Perhaps there would have been some force in this if the stipulation had ended with the word "court." But, after enumerating every possible remedy on the mortgage, there is added, "or otherwise, as he may elect." It seems to us clear that this refers back to the clause "may proceed and collect the same," and has no relation to the foreclosure of the mortgage. Thus con-

strued, the stipulation authorizes the holder of the note, upon the default named, to declare the principal sum due for all purposes.

It can hardly be necessary to add that the defendant, having guarantied the payment of the note according to its terms, is not entitled to have any other or different construction placed upon this stipulation than the maker would, had he been sued.

Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 988.)

FREDERICK B. LATHROP vs. JAMES S. O'BRIEN.

Argued May 8, 1894. Reversed May 7, 1894.

No. 8715.

A tender refused on a specified ground waives others.

Where objection to the sufficiency of a tender is made solely on a certain specified ground the party is precluded from afterwards raising another objection, at least where it is trifling in its nature, and such that, if made at the time, the other party might have easily remedied it.

Appeal by plaintiff, Frederick B. Lathrop, from a judgment of the District Court of Washington County, *W. C. Williston, J.*, entered August 22, 1893, that he take nothing by his action.

EXHIBIT B.

Stillwater, Minn., August 15th, 1889.

Memorandum of agreement between Frederick B. Lathrop and James S. O'Brien in relation to timber lands described as follows, situated in Pine County, Minn., and Douglass County, Wis. (Here follows description of 640 acres in Pine County and 160 acres in Douglass County.) O'Brien agrees to give \$3,250 for good title to same, and in cutting same if two millions are found according to Surveyor General's scale, he will pay to said Lathrop \$250 more as commission. This in consideration of information and services of

said Lathrop. F. B. Lathrop agrees to produce deeds for same from owners.

J. S. O'Brien.

Fred'k B. Lathrop.

Henry C. Fuller of Lowell, Mass., held title to 800 acres of land described in the foregoing contract. The plaintiff, Frederick B. Lathrop, was in communication with him but the defendant James S. O'Brien did not know the name or residence of the owner, but knew that Lathrop did know. On the day of its date they entered into the foregoing contract, Exhibit B. On September 19, 1889, Lathrop produced and tendered to O'Brien deeds from Fuller of all these lands and also produced and tendered abstracts of title and the unrecorded patents from the government and demanded \$3,246.50. O'Brien refused to accept or pay the money saying that an additional forty acres of land mentioned by him should have been included in the contract, Exhibit B., and in the deed to him from Fuller and unless it also should be conveyed he would not perform on his part.

There were in fact more than two millions feet of pine timber on these lands. Fuller subsequently sold these lands to others, and on December 12, 1890, plaintiff brought this action against O'Brien to recover the damages sustained by reason of his refusal to perform, and claimed \$496.50 and interest. Defendant answered that by mistake or fraud the additional forty acre tract was omitted from the contract and deeds tendered and he based his defense solely on that ground. At the trial December 29, 1892, defendant failed to prove such mistake or fraud, but his counsel claimed, and the court found, that the fact that the patents were not recorded in the Registry of Deeds of Pine County, Minn., and of Douglass County, Wis., rendered the title not good within the terms of Exhibit B., citing *George v. Conhaim*, 38 Minn. 338. Findings of the facts and conclusions of law were made and filed and judgment ordered for defendant. Among the findings was the following, viz.:

"That on September 19, 1889, at the time of the tender of the deeds defendant did not object to such tender on the ground that the patents tendered were not recorded in the counties respectively wherein the lands therein described were situate; nor on the ground that the fees for such recording of said patents or either of

them were not paid or tendered; and neither of such objections were made at said time."

Plaintiff made a case containing all the evidence and his exceptions and on it and the pleadings and files, moved for a new trial but was refused and judgment was entered that he take nothing. He appeals.

Searles & Gail, and Frederick B. Lathrop, for appellant.

Plaintiff was clearly entitled to the judgment demanded if the tender was good. The order for judgment for defendant was based solely on the ground that in the opinion of the court the tender was not good. Upon that assumption alone the judgment rests. The alleged defect in the tender arose from the fact that certain original patents were tendered but not recorded. This objection was not raised at the time of the tender, was not pleaded, was not raised at the trial, and was never mentioned until the argument.

Defendant relies on *George v. Conhaim*, 38 Minn. 338. It is not determined there that title cannot be good unless it is of record. That case simply decides that the vendee is entitled to the deed of the vendor and his personal covenants. It does not appear anywhere therein that title cannot be good unless it is of record.

The patents in evidence being regularly issued are conclusive: (1) Of the title in the grantee. (2) That the government has parted with its title and control of the land. (3) That all formalities preliminary to issue have been complied with. They cannot be collaterally attacked. They convey title by record. They are the highest evidence of title known to the law. It does not signify if they are never delivered, nor if they are lost, the record at Washington is of equal force and effect. *United States v. Schurz*, 102 U. S. 378; *Green v. Lister*, 8 Cranch, 229; *Smelting Co. v. Kemp*, 104 U. S. 636; *Gibson v. Chouteau*, 13 Wall. 92; *Bragnell v. Broderick*, 13 Pet. 436; *Leroy v. Jamison*, 3 Sawy. 391; *Gilmore v. Sapp*, 100 Ill. 297; *Donner v. Palmer*, 31 Cal. 500; *Weber v. Pere Marquette B. Co.*, 62 Mich. 636.

There can be no subsequent patent. The government having issued a patent has no power to issue another. Patents for lands

previously granted or reserved are void, not merely voidable, but void, and are open to collateral attack. *Burfenning v. Chicago, St. P., M. & O. Ry. Co.*, 46 Minn. 20; *Francoeur v. Newhouse*, 40 Fed. Rep. 618; *Doolan v. Carr*, 125 U. S. 618; *Morton v. Nebraska*, 21 Wall. 660; *Reichart v. Felps*, 6 Wall. 160; *Polk's Lessee v. Wendall*, 9 Cranch, 87; *United States v. Stone*, 2 Wall. 525.

Defendant cannot now avail himself of the objection that the patents were not locally recorded, because at the time of the tender he objected to it on other grounds and was silent on this. Where a specific objection is made to a tender, all others not mentioned are waived. *Cummings v. Rogers*, 36 Minn. 317; *Johnston v. Johnson*, 43 Minn. 5; *Nelson v. Robson*, 17 Minn. 284; *Drake v. Barton*, 18 Minn. 462; *Gould v. Banks*, 8 Wend. 562; *Whelan v. Reilly*, 61 Mo. 565; *Haskell v. Brewer*, 11 Me. 258; *Wood v. Babb*, 16 S. C. 427.

Upon well established principles an objection made at the time of the tender precludes all others and if that objection be not well grounded, the tender is good. *Moynahan v. Moore*, 9 Mich. 9; *Adams v. Helm*, 55 Mo. 471; *Wesley v. Noonan*, 31 Miss. 603; *Gilbert v. Mosier*, 11 Ia. 498; *Thayer v. Meeker*, 86 Ill. 470; *Lacy v. Wilson*, 24 Mich. 479; *Fosdick v. Van Husan*, 21 Mich. 567.

The findings of fact beyond question required that judgment should be ordered for plaintiff, for the relief demanded in the complaint and plaintiff requests this court to so order on the facts found. A new trial is unnecessary.

Nethaway & Gillen, for respondent.

The court below found as a fact that the several patents issued by the United States, but not recorded in the counties in which the lands were situate, were tendered to O'Brien, but neither at the time of making the tender or at any other time did Lathrop tender any fees for recording these patents. There were six of them, and it was this that the court below held was fatal to Lathrop's recovery, and the only fact which prevented the court below from ordering judgment for him. This is really the only question in the case.

O'Brien agreed to pay \$3,250 for a good title to this land. When Lathrop tendered a lot of patents which constitute the chain of title

and which were unrecorded he was demanding of O'Brien more money than he agreed to pay for this land, viz., the \$3,250 and an amount necessary to pay for recording the patents. It seems unnecessary to discuss this question any further in view of what is said by this court in *George v. Conhaim*, 38 Minn. 338.

MITCHELL, J. By the contract of the parties (Exhibit B) defendant agreed to give a specified sum for "good title" to the lands therein described, and the plaintiff agreed "to produce deeds for the same from the owners." Both parties understood that plaintiff was not the owner of the lands, but that the conveyances were to come from a third party.

It is undisputed that the title tendered to defendant by plaintiff was "good," unless it was for the fact that the original patents for the land (which were tendered with the deeds from the owner) had not been recorded in the counties where the lands were situated, and that no money was tendered to pay the expense of recording them; and it was solely on this ground that the trial court held that the tender was insufficient, and that defendant was justified in refusing to accept the deeds. It is undisputed that defendant expressly placed his refusal exclusively on the ground that the deeds did not include and convey a certain forty-acre tract not described in the contract, but which he claims should have been included. In his answer, also, he justifies his refusal to accept the deeds solely on this ground,—a claim which he failed to establish by evidence.

It is also undisputed that at the time the deeds were tendered the objection that the patents had not been recorded, and no money tendered to pay for recording them, was neither made nor suggested.

Conceding, for the sake of argument, that the tender was insufficient for the reasons stated, yet the defendant, having placed his refusal solely on a certain other specified objection, is precluded from now raising another objection, trifling in its character, and which, if made at the time, could have been easily remedied by the plaintiff. It does not appear how much it would have cost to record the patents,—six or seven in number,—but it could only have amounted to a few dollars at most. It appears that the amount of money demanded by plaintiff was \$3.50 less than the sum named in the contract. The evidence is silent as to why this deduction was

made, but it is not a very violent assumption that it was designed to meet the cost of recording patents; and, if so, the defendant did not object to the sufficiency of the amount. But, however this may be, upon the facts proved and found defendant must be held to have waived the objections to the tender which he now urges.

The judgment is reversed, and the cause remanded, with directions to the court below to render judgment in favor of the plaintiff for the sum of \$496.50, with interest from the commencement of the action.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 987.)

UNION BANK OF MEDINA *vs.* J. A. SHEA.

Argued April 25, 1894. Affirmed May 7, 1894.

No. 8683.

Findings supported by the evidence.

Evidence considered, and *held* sufficient to justify a finding that defendant promised plaintiff to accept a succession of drafts to be thereafter drawn on him by a third party.

Contract made by acting upon a proposal.

The act of plaintiff in receiving and cashing such drafts in reliance on such promise was an acceptance of defendant's proposition, which made a binding contract; and the seasonable presentation of such drafts to defendant for acceptance was all the notice that was required.

Acceptance by action within a reasonable time.

In the case of a promise to accept nonexistent bills or drafts they must be drawn within a reasonable time after the promise, otherwise the promisee will be presumed to have declined to act on the promise.

Appeal by defendant, J. A. Shea, from a judgment of the District Court of Hennepin County, *Henry G. Hicks, J.*, entered August 9, 1893, in favor of the plaintiff, Union Bank of Medina, and against him for \$3,812.56. Appeal also by defendant from an order in the same action made September 19, 1893, denying his motion for a new trial.

Samuel C. Bowen of Medina, New York, in November, 1891, shipped to defendant, J. A. Shea of Minneapolis, sixty six car loads of apples to be sold on commission. To obtain money with which to buy these apples Bowen applied to the plaintiff and it agreed to advance \$1.25 per barrel on his drafts with shipping bills attached, if defendant would first agree to accept the drafts. This defendant did by the correspondence and telegrams as stated in the opinion. He paid fifty three of the drafts but, after receiving all of the apples, refused to accept or pay the last thirteen drafts amounting to \$3,366.25. Plaintiff brought this action upon the promise to accept, and asked judgment for that sum with interest.

Defendant by his answer denied that he promised to accept these drafts and stated that Bowen shipped sixty six cars of apples, that defendant sold them to the best advantage and realized \$26,670.29, paid freight \$8,513.82, cartage and storage \$783.27, and on Bowen's drafts \$14,706.18, and that the balance \$2,667.02 was his commission on the sales. Plaintiff replied and the issues were tried June 22, 1893, before the court without a jury. Findings were made and judgment entered for the plaintiff for the amount it claimed. Defendant was on motion allowed to make and settle a case after judgment and to move for a new trial, but a new trial was refused and he appealed from both the judgment and the order of refusal.

A. D. Smith, and Gallagher & Gallagher, for appellant.

The plaintiff under the telegrams and other exhibits claims the rights of a holder of negotiable paper; the defendant, however, claims that he has kept fully whatever agreement he made with the bank, and that his charges against Bowen for selling the fruit ought in law and equity to be allowed. As the fruit did not sell for enough to pay all, the defendant ought not to be compelled to pay plaintiff and look to Bowen for repayment. There was no definite or certain agreement ever made between the plaintiff and the defendant. Defendant's telegram and letter to Bowen were, if of any validity whatever, only propositions to guarantee Bowen's drafts, and as there was no notice of acceptance by the plaintiff bank and no definite amount or time specified for which they would

take defendant's guaranty, the defendant is not liable. *Vyse v. Wakefield*, 6 M. & W. 442; 2 Daniel, Neg. Inst., §§ 1785, 1786; *Mussey v. Rayner*, 22 Pick. 223; *Montgomery v. Kellogg*, 43 Miss. 486; *Davis Sew. M. Co. v. Richards*, 115 U. S. 524.

Neither can the defendant be held on a promise to accept under *Woodward v. Griffiths-Marshall G. C. Co.*, 43 Minn. 260. The case might apply to the first draft made by Bowen and purchased by the bank, and which was paid. *Coolidge v. Payson*, 2 Wheat. 66.

The court below seemed to think that the fact that Bowen endorsed the bills of lading to the bank was conclusive evidence of notice to the defendant. But if he had notice the fact remaining uncontroverted that he was selling on commission for Bowen the transfer of the bills of lading could in no event put the bank in any better position than Bowen was in. 2 Daniel, Neg. Inst., § 1750; *Security Bank of Minnesota v. Luttgen*, 29 Minn. 363.

Koon, Whelan & Bennett, for respondent.

The construction which parties by their conduct place upon their contract, if not inconsistent with its terms will be adopted by the court in interpreting it. *Vermont St. M. E. Church v. Brose*, 104 Ill. 206; *Hall v. First Nat. Bank*, 133 Ill. 234.

It is idle to urge that the bank would make a contract to advance \$1.25 for every barrel of apples Bowen might ship to Shea, knowing that the apples might prove worthless and be charged back to Bowen as an entire loss. In that case the bank would only have the personal responsibility of Bowen to secure itself for the money advanced, whereas the facts and the reason of the case show that it had and entered into the contract to advance money only on the belief that it had in addition to this personal liability of Bowen, the liability of Shea upon this promise to accept the drafts and a special property in the apples by virtue of the indorsement to it of the bills of lading.

We agree that the contract of guaranty, like other contracts rests upon the mutual assent of the parties found in offer and acceptance. We agree that the telegram is an offer of a contract. But we do not agree that notice should be given of the intention of the guarantee to act under it, as one of the conditions of the

promise of the guarantor. The assent of a party to whom a proposal is made may be signified to the party making it, by immediately acting under it to the knowledge of the party proposing. *Davis v. Wells*, 104 U. S. 159; *Louisville Mfg. Co. v. Welch*, 10 How. 461; *Wildes v. Savage*, 1 Story, 22; *Davis Sew. M. Co. v. Richards*, 115 U. S. 524; *Winnebago Paper Mills v. Travis*, 56 Minn. 480.

Whether proper notice has been given is a question of fact to be determined upon consideration of the relative situation of the parties and all the attending circumstances. *Lowry v. Adams*, 22 Vt. 160; *Walker v. Forbes*, 25 Ala. 139; *Lawrence v. McCalmont*, 2 How. 426; *Louisville Mfg. Co. v. Welch*, 10 How. 461; *Reynolds v. Douglass*, 12 Pet. 497; *Oakes v. Weller*, 16 Vt. 63; *Noyes v. Nichols*, 28 Vt. 160; *Lee v. Briggs*, 39 Mich. 592; *Woodstock Bank v. Downer*, 27 Vt. 482; *Woodward v. Griffiths-Marshall G. C. Co.*, 43 Minn. 260.

It is not necessary that a new promise be made for each successive draft. The promise may be and in this case was to accept a series of drafts. *Ulster County Bank v. McFarlan*, 5 Hill, 432; *Nelson v. First Nat. Bank*, 48 Ill. 36.

The evidence shows that the bank advanced money upon the transfer to it of the bills of lading and acquired title to the property represented by the bills before any other right or claim could have attached thereto. It is clear that Shea took the property subject to the rights of the bank thus acquired. *First Nat. Bank v. Ege*, 109 N. Y. 120; *Commercial Bank v. Pfeiffer*, 108 N. Y. 242; *Hathaway v. Haynes*, 124 Mass. 311; *Heiskell v. Farmers' & M. Nat. Bank*, 89 Pa. St. 155.

It appears from the evidence that Shea took the consignments of apples in question, with full notice and knowledge of the rights and claims of the bank in and to them, and thereafter with such knowledge sold the apples, received the avails, and appropriated them to his own uses. These facts would make him liable on the drafts as an implied acceptor. *Hall v. First Nat. Bank*, 133 Ill. 234; *Nutting v. Sloan*, 57 Ga. 392.

MITCHELL, J. Plaintiff's first cause of action (which is the only one we need consider) is based upon the alleged promise of de-

fendant to plaintiff to accept the drafts described in the complaint, drawn by one Bowen on defendant in favor of the plaintiff; and the main question is as to the sufficiency of the evidence to establish this promise. We are not unmindful of the fact that the question as to what was the contract between plaintiff and defendant must be determined by what passed between themselves; but it is nevertheless legitimate to construe their language and acts in the light of the relations of all parties to each other and to the subject-matter, and of the objects sought to be attained, at least so far as these were known at the time to both plaintiff and defendant.

The plaintiff was a bank doing business in Medina, N. Y. Bowen, who resided in the same place, was a produce dealer, engaged in buying, selling, and shipping fruit. Defendant was a dealer and commission merchant in fruits in Minneapolis, in this state. During the fall of 1891, and prior to November 5th, Bowen had shipped fruit to defendant, to be sold on commission. November 5th defendant wired Bowen: "Ship as heavy as possible on apples. Big demand." On receipt of this, and on the same day, Bowen went to plaintiff, and requested it to advance him \$1.25 per barrel on his drafts on defendant against consignments. The plaintiff consented to do this if defendant would wire or write it that he would accept the drafts, bills of lading for the consignments to be attached to the drafts as security for their payment. Thereupon Bowen wired defendant: "Will ship six or seven cars today. Wire Union Bank you will pay any sight drafts, ten shillings barrel, with bill of lading." On receipt of this defendant immediately wired plaintiff: "Will honor S. E. Bowen's draft against apples, dollar quarter barrel. Have been taking care of everything promptly;" and at the same time wired Bowen, "Will advance dollar quarter on apples."

On the next day (November 6th) defendant wrote Bowen, acknowledging receipt of the telegram of the day previous, quoting it verbatim, and adding, "which we immediately complied with." This letter then went on to state what an elegant trade defendant had, and what a big business he would do if Bowen would give him good fruit; and then concluded by requesting Bowen thereafter to make his drafts at five days' sight instead

of at sight, as it was taking a large amount of money to carry on the business, adding, "But, if your bank objects to the five days, and it is not customary with you, it is all right."

On receipt of defendant's telegram of November 5th, plaintiff commenced accepting and cashing Bowen's sight drafts on defendant to the amount of \$1.25 per barrel of apples shipped to defendant, the bills of lading (one for each car load) indorsed and delivered to the plaintiff, accompanying the drafts. Between November 5th and 9th, inclusive, plaintiff had cashed some eleven of these sight drafts. On November 9th Bowen showed plaintiff defendant's letter of November 6th, and, as therein suggested, arranged with plaintiff to take drafts at five days' sight instead of at sight, and with that modification the business proceeded as before until by November 12th plaintiff had discounted and cashed in all thirty three drafts, all accompanied by the bills of lading. Of these drafts defendant accepted and paid twenty, but refused to accept or pay the remaining thirteen, although he received and sold the thirteen cars of apples, the bills of lading for which were indorsed to the plaintiff, and attached to the drafts.

Plaintiff had no notice that any of the drafts had been dishonored until December 6th.

Defendant's principal contention is based upon the language of his telegram of November 5th to plaintiff. His claim is that, as it uses the word "draft" in the singular, he only promised to pay one draft, and that it has been paid. The language of the telegram, standing alone, might justify this contention; but, taking into consideration the subject-matter, the position of the parties, and the objects sought to be attained, it seems clear that what was in mind was, not a single draft against one car load of apples, or even against the six or seven car loads shipped on November 5th, but a succession of drafts on successive consignments.

Defendant was anxious for large future consignments of apples from Bowen, and Bowen wanted money to buy the fruit; and what was wanted to accomplish this was to enable Bowen to negotiate, not merely one draft, but a succession of drafts, to enable him to continue large shipments to defendant. What Bowen requested in his telegram to defendant was to wire plaintiff that he would accept "any sight drafts" to the amount of ten

shillings a barrel. That defendant himself understood his telegram to the plaintiff as a promise to do so is clearly indicated in his letter of November 6th to Bowen, in which, after quoting Bowen's telegram to him, he says that he has complied with it. His request in that letter that future drafts be made at five days' sight, as well as his conduct in accepting drafts up to the number of twenty, also indicates that he understood the arrangement as applying to a succession of drafts on future consignments; and under the circumstances the plaintiff was fully warranted in placing that construction on his promise.

Much of the findings of the court consists of statements of mere evidential facts, some of which may not be fully justified by the record; but upon the material ultimate fact of defendant's promise to accept these drafts the evidence was ample. *Hall v. First National Bank*, 133 Ill. 234, (24 N. E. 546.)

There is nothing in the point that it was necessary, in order to hold defendant liable, that the plaintiff should, before taking the drafts, have notified defendant of its acceptance of his promise, and of the amount to which it intended to take the drafts.

Of course, defendant's telegram to plaintiff was merely in the nature of an offer, which only ripened into a binding contract when accepted by the plaintiff. Until then defendant could have withdrawn it. But plaintiff's acting on the faith of the promise by receiving and cashing a draft or drafts constituted an acceptance of the offer, and created a binding contract as to such draft or drafts; and the seasonable presentation of such drafts to defendant for acceptance was all the notice that was required. As to any future drafts, defendant's promise remained still a mere offer, which he might withdraw by giving plaintiff notice to that effect; but until such notice defendant's telegram amounted to a representation that Bowen had a continuing authority to draw on him to the amount indicated, and that defendant would accept such drafts.

To avoid misapprehension in other cases, it should be added that in the case of a promise to accept nonexistent bills or drafts they must be drawn within a reasonable time after the promise; otherwise the promisee will be presumed to have declined to act on the promise, and the promisor will not be deemed to have in-

tended a liability indefinite in time. No such question, however, arises in this case.

Our view as to the effect of the evidence of an express promise by defendant renders it unnecessary to consider whether his acts in taking the consignments of apples against which the drafts were drawn, with full knowledge of plaintiff's rights under the indorsement to it of the bills of lading, did not amount to an implied promise to accept the drafts.

Many of defendant's assignments of error relate to the action of the trial court in excluding evidence as to the dealings between defendant and Bowen, and the state of the account between them, not communicated to plaintiff. All this evidence was clearly incompetent and irrelevant. The contract between defendant and plaintiff must depend on what took place between themselves, and cannot be affected by dealings between defendant and Bowen of which plaintiff had no knowledge.

Judgment and order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 985.)

HARRY C. CRAWFORD *vs.* HURD REFRIGERATOR CO.

Submitted on briefs May 4, 1894. Reversed May 7, 1894.

No. 8604.

Duluth Municipal Court jurisdiction.

The municipal court of Duluth has no jurisdiction of an action where the sum claimed in the complaint, including interest, exceeds \$500, although the principal sum is less than that amount.

Appeal by defendant, the Hurd Refrigerator Company, a corporation, from an order of the Municipal Court of the City of Duluth, *Eric L. Winje, J.*, made November 7, 1893, overruling its demurrer to the complaint.

This action was commenced August 25, 1893. The complaint stated that on November 1, 1891, the plaintiff, Harry C. Crawford,

57 187
68 436

agreed with defendant to solicit customers for it and to sell its goods for one year thereafter and it agreed to pay him therefor five per cent. of the price of all goods sold by him, that he performed the contract on his part and sold goods to the value of \$14,039.85, that his commission was \$701.99, that he had received thereon \$224.33. He demanded judgment for the balance, \$477.66, with interest thereon from November 1, 1892, with costs.

The defendant demurred to this complaint and specified as ground of objection that the Municipal Court had not jurisdiction of the subject of the action. That court overruled the demurrer and defendant appeals.

White & McKeon, for appellant.

The Municipal Court of the City of Duluth was created by Sp. Laws 1891, ch. 53, and its civil jurisdiction is as follows: "Of an action arising on contract for the recovery of money only, if the sum claimed does not exceed five hundred dollars." The amount claimed by plaintiff was at the date of the commencement of this action \$504.97 exclusive of the costs. The court below applied the same rule to interest before, that this court applied after, trial until the entry of judgment in *Conger v. Nesbitt*, 30 Minn. 436.

Interest to the commencement of suit is to be considered in deciding upon the question of jurisdiction. *Cooper v. Reaney*, 4 Minn. 528.

Mann & Corcoran, for respondent.

The question involved has never been settled in this state.

The subject of interest was referred to in *Conger v. Nesbitt*, 30 Minn. 436, and in *Cooper v. Reaney*, 4 Minn. 528.

In some states the statute settles the question as to whether or not interest is to be taken into consideration in determining the court's jurisdiction. *Gregg v. Wooden*, 7 Ind. 499; *Hedgecock v. Davis*, 64 N. C. 650; *Sweeny v. Lowe*, 6 B. Mon. 314; *Planters' Bank v. Caulson*, 7 Miss. 395; *Decklar v. Frankenberger*, 30 La. Ann. Part 1,410; *Cole v. Hayes*, 78 Me. 539.

MITCHELL, J. The municipal court of the city of Duluth is created by Sp. Laws 1891, ch. 53, by which it is given jurisdiction "of

an action arising on contract for the recovery of money only, if the sum claimed does not exceed five hundred dollars."

The sum claimed in the complaint, and for which plaintiff demands judgment, is the criterion. *Barber v. Kennedy*, 18 Minn. 216 (Gil. 196).

And it cannot make any difference whether the sum claimed consists wholly of principal, or partly of principal and partly of accrued interest, or whether the pleader makes the computation of interest, or leaves it to be computed by the court or jury.

As long ago as *Cooper v. Reaney*, 4 Minn. 528 (Gil. 413), this court held that interest was to be deemed part of the amount in controversy in determining whether the district court had jurisdiction under 1851 R. S. ch. 69, art. 2. *Conger v. Nesbitt*, 30 Minn. 436, (15 N. W. 875,) is not in point. What was decided in that case was that interest accruing after the finding or verdict, until the entry of judgment, was not to be taken into account, because it never was "in controversy," but was incident to the main recovery, the same as costs and disbursements.

The amount claimed in the present action was \$477.66, with interest at 7 per cent. from November 1, 1892, which amounted to more than \$500. Hence, in our opinion, the municipal court had not jurisdiction of the subject of the action.

Order reversed.

Buck, J., absent, sick, took no part.

(Opinion published 58 N. W. 985.)

JOSEPH FREDETTE *vs.* MORRIS THOMAS.

Argued April 27, 1894. Affirmed May 7, 1894.

No. 8364.

Contract to sell and deliver logs construed.

Held that, upon the undisputed facts of this case, there was a delivery of the property sufficient to pass the title, and consequently the risk, from the vendor to the vendee.

Appeal by defendant, Morris Thomas, from a judgment of the District Court of St. Louis County, *J. D. Ensign, J.*, entered December 7, 1892, against him for \$428.02.

On November 20, 1890, the plaintiff, Joseph Fredette, made a contract in writing with defendant to cut into logs and piles the merchantable timber on Section 36, T. 48, R. 16, in Carlton County, and deliver the same to defendant on or before April 10, 1891, upon the right of way of the Northern Pacific Railroad near Carlton Station at points most convenient for loading them onto cars. Defendant agreed to pay for logs so delivered \$4.25 per thousand feet board measure for pine sawlogs and \$5 per thousand feet for hard wood sawlogs. The logs were to be scaled by the surveyor general of logs for that district and defendant agreed to pay for the scaling and in consideration thereof Fredette agreed to furnish all car stakes necessary for loading the logs. Defendant further agreed to pay one half the purchase price of the logs from time to time as they should be banked and the balance when he should sell them in the spring or summer following. It was further agreed that Fredette should pay all stumpage that might attach to the logs.

On or before March 15, 1891, Fredette cut and banked about 180,000 feet board measure of pine sawlogs and furnished sufficient car stakes for loading them, and on March 22, notified defendant thereof. But defendant neglected to have the logs scaled or shipped to market and on May 6, 1891, the logs were destroyed by fire without fault on the part of anyone. Defendant had paid Fredette \$384.05 on account, and this action was to recover the balance of the purchase price. On these facts plaintiff had a verdict for \$379.04. Defendant moved for a new trial but was de-

nied. Judgment was entered for the amount with costs and defendant appeals.

William B. Phelps, for appellant.

Tear Davis & Bureau, for respondent.

MITCHELL, J. Aside from the question of quantity or amount, the only issue in this case was whether, at the time the logs were destroyed, on May 6th, there had been a delivery sufficient to pass the property, and consequently the risk, from plaintiff, the seller, to defendant, the buyer. It seems to us that, upon the undisputed facts, the written contract of the parties is decisive of that question. It expressly provides what the mode or manner of delivery shall be, to wit, placing the logs, on or before April 10th, on the railroad right of way near Carlton Station, in the most convenient position for loading on the cars; and for logs "so delivered" the defendant was to pay the stipulated price per thousand. We are of opinion that under this contract there was a delivery of the logs so as to pass title to the defendant as soon, and as fast, as they were deposited at the place, and in the manner, provided for. The undisputed evidence is that the logs were thus deposited on or before April 10th.

It seems to us that the contentions of defendant are all based on the assumption that the contract is entire in certain respects wherein it is in fact severable, and that certain stipulations in it are conditions precedent to a delivery which have no connection with it. The contract clearly contemplates delivery as well as payment by installments. There is nothing in the nature of the property to indicate that the cutting and delivery of both the logs and the piles, or of every log on the land, was essential, or could affect the object of the contract, or would have influenced the sale had a failure in that respect been anticipated. *McGrath v. Cannon*, 55 Minn. 457, (57 N. W. 150;) *Potsdamer v. Kruse*, *post*, p. 193, (58 N. W. 983.)

The provisions as to scaling and as to "car stakes" were entirely independent of, and disconnected with, the matter of the delivery of the logs. Either of these things could and might have been done after, as well as before, delivery. Indeed, the fair inference is that the scaling was to be done after delivery. It was a matter

that had reference solely to ascertaining the quantity of the logs; and, under the contract, defendant himself had a perfect right to have it done.

There is nothing in the point that, as one-half of the purchase money was to be paid when defendant sold the logs in the spring or summer of 1891, and inasmuch as the logs have been destroyed before sale, therefore defendant is not liable. That provision has reference merely to the time of payment, and was not intended to make the purchase price payable only out of a special fund, to be derived from the sale of the property.

The contract contains a stipulation that plaintiff "shall pay for all stumpage that may attach to the said logs." We fail to see that this has any connection with the delivery of the logs, unless, forsooth, it should appear that they were subject to some lien for stumpage, the existence of which would preclude any delivery that would pass the title. It is urged, however, that it appears that the logs were cut on state land under a permit, and that plaintiff cannot recover the purchase price, because it does not appear that the stumpage has been paid. There is nothing in either the pleadings or the contract to indicate that the logs were cut on state land, or that any stumpage was in fact due either the state or any one else; and from an examination of the record we are satisfied that no such point was either raised or suggested on the trial. Most of the evidence on the trial was directed to the question of the number of feet in the logs, the defendant claiming that their average size was much less than testified to by plaintiff; and to prove this he introduced witnesses who were familiar with section 36, and who testified that it had been cut over before and that what timber was left was of small size. Among these witnesses was one Frazier, who testified that in 1889 he examined the land, and found so little timber on it that he advised the state auditor to sell it to plaintiff for the lump sum of \$100, which was done. This evidence was manifestly introduced for the sole purpose of showing the poor quality and small size of the logs, and the use now sought to be made of it was not once suggested on the trial. It nowhere appears that plaintiff did not pay the state \$100, or that the logs are, or ever were, subject to any lien for stumpage.

We think that the trial judge would have been justified in instructing the jury that there had been a delivery of the logs sufficient to pass the title. This being so, his submitting the question to the jury could not have prejudiced the defendant, and the errors, if any, in the charge on that point, are wholly immaterial. Judgment affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 984.)

DAVID F. POTSDAMER *et al.* vs. HENRY KRUSE *et al.*

Submitted on briefs April 19, 1894. Reversed May 7, 1894.

No. 8595.

A severable contract.

A certain order for different articles, the quantity, description, and price of each being separately specified, *held* to be severable, so that the purchaser, upon receipt of goods, might retain those which were in accordance with the contract, and refuse to accept those which were not.

Appeal by defendants, Henry Kruse, Gottfried Kruse and Louis Kruse, from an order of the District Court of Blue Earth County, *M. J. Severance, J.*, made August 31, 1893, denying their motion for a new trial.

Action by David T. Potsdamer, Simeon M. Lyon and William K. Myer, copartners, to recover \$86.35 balance due for merchandise sold. The case is stated in the opinion. By direction of the Judge the jury returned a verdict for the plaintiffs for the amount claimed with interest. The defendants moved for a new trial but were denied and they appeal.

W. L. Comstock and Byron Hughes, for appellants.

The contract of sale herein was not entire, but was a divisible or separable contract. Each kind or parcel of the goods was sold by exhibiting distinct or separate samples of that kind. Each kind was specifically mentioned in the terms of sale and charged

v.57m.—13

57 193
57 191

in the invoice or bill of shipment, and the total charges for each kind or parcel was carried out.

When a certain value can be assigned to a distinct portion of the whole the contract is held separable; when it cannot be so assigned the contract is held entire. A contract consisting of several distinct items and founded on a consideration which is apportioned to each item, is severable. *Lauesco Oil Co. v. Brewer*, 66 Pa. St. 351; *More v. Bonnet*, 40 Cal. 251; *Goodwin v. Merrill*, 13 Wis. 658; *Alcott v. Hugus*, 105 Pa. St. 350; *Veerkamp v. Hulburd C. & D. Co.*, 58 Cal. 229; *Spear v. Snider*, 29 Minn. 463; *Stickel v. Steel*, 41 Mich. 350; *Myer v. Wheeler*, 65 Ia. 390.

The defendants do not propose to rescind the contract or any part of it. They demand the fulfillment of the whole of it and defend this suit for the failure on the part of plaintiffs to perform. *Lampson v. Cummings*, 52 Mich. 491; *Johnson v. Johnson*, 3 Bos. & Pul. 162; *Miner v. Bradley*, 22 Pick. 457; *Voorhees v. Earl*, 2 Hill, 288; *Lawton v. Howe*, 14 Wis. 241; *Cushing v. Rice*, 46 Me. 303; *Ketchum v. Stevens*, 19 N. Y. 499.

Thomas Hughes and Evan Hughes, for respondents.

The contract in question was an entire one. There was but one sale of but one kind of goods, made at one time, in one order, and delivered at once in one box by plaintiffs to defendants. But one bill was rendered for all the goods. The discount given was on the entire bill. The payment made by the defendant was on the entire bill.

To sever such a contract would destroy it. Unless defendants got their full assortment of thirty three dozen they could not be compelled to accept any, unless they saw fit to do so. If it is entire as to the defendants it must be so as to plaintiffs. Under the statute of frauds we would have to come to the same conclusion—that it was entire. If we should apply the test of whether it embraced one or more causes of action the result is the same. Indeed, from every point of view this sale is clearly an entire one, and being entire the defendants could not without the plaintiff's consent affirm it in part and rescind it in part. *Pope v. Porter*, 102 N. Y. 866; *Norrington v. Wright*, 115 U. S. 188; *Lyon v. Bertram*,

20 How. 149; *Mills v. Hunt*, 17 Wend. 333; *Masson v. Boret*, 1 Denio, 69; *Hoffman v. King*, 70 Wis. 372; *Becker v. Trickel*, 80 Wis. 484; *Mansfield v. Trigg*, 113 Mass. 350; *Kellogg & Co. v. Turpie*, 93 Ill. 265; *Clark v. Baker*, 5 Met. 452; *Gault v. Brown*, 48 N. H. 183; *Hubbardston Lumber Co. v. Bates*, 31 Mich. 158.

MITCHELL, J. The defendants, retail merchants in Mankato, ordered from plaintiffs, manufacturers and jobbers in New York City, various numbers of some nine or ten different kinds or styles of neckties, amounting in all to thirty three dozen. The quantity, description, and price of each style were separately specified in the order. The goods were to be according to samples of each style exhibited by plaintiffs when the order was given. The goods were all shipped from New York in the same box, but each style in a separate parcel. When the goods were received in Mankato, the defendants immediately examined them, and, finding some styles according to the samples, and others not, they retained the former, and promptly shipped the latter back to the plaintiffs, notifying them that they did so because the goods were not according to the contract. The plaintiffs refused to take back the goods, and brought this action for their purchase price. The court directed a verdict for the plaintiffs on the ground that the contract was entire, and that there could be no "rescission" unless defendants returned all the goods.

While it is not uncommon to speak of such a case as a rescission, yet it does not stand on the ground of rescission. The act of refusing to accept an article as not being in accordance with the terms of a previous executory agreement is one of insistence on, and not of rescission of, the contract. The contention of the plaintiffs is that the contract was entire, and that an acceptance of part of the goods was an acceptance of the whole; while the contention of the defendants is that the contract was severable, and consequently that they had the right to accept such of the goods as were according to the contract, and refuse to accept such as were not.

The question of the entirety or divisibility of contracts has presented itself to the courts in a variety of ways. Sometimes the question was whether there had been an acceptance of part of the

goods, within the meaning of the statute of frauds; sometimes whether a party who had failed to fully perform could recover for what he had performed; sometimes whether a party had a right to rescind as to part of the property; at other times whether the statute of limitations had run, or whether a single cause of action had been split; and again, as in this case, whether a party had a right to accept part of the goods, and refuse to accept the remainder as not being in accordance with the contract. And we think an examination of the authorities will show that the decision of the courts whether, in a given case, a contract is to be treated as entire or as severable, has frequently been made to depend somewhat upon the purpose for which the question was invoked. Whether this is logical or consistent with principle it is unnecessary here to consider. We had occasion recently to consider this question in *McGrath v. Cannon*, 55 Minn. 457, (57 N. W. 150,) in which we cited 2 Pars. Cont. 648, and *Norris v. Harris*, 15 Cal. 226, as among the best statements of the law on the subject to be found in the books.

In the former it is said: "If the part to be performed by one party consists of several distinct items, and the price to be paid by the other is apportioned to each item to be performed, or left to be implied by law, such contract will generally be held to be severable."

In the latter it is said: "A contract made at the same time for different articles at different prices is not an entire contract, unless the taking of the whole is essential from the character of the property, or is made so by the agreement of the parties, or unless it is of such a nature that a failure to obtain part of the articles would materially affect the object of the contract, and thus have influenced the sale had such a failure been anticipated."

Applying these tests to the facts of this case, we think the contract was severable and divisible, at least as to the several different styles of goods. While it was one in the sense that it was all made at the same time, and embraced in the same writing, yet the different kinds and styles of goods were distinct in character, and separate prices were specified for each. There is nothing to indicate that the price of one kind was fixed with reference to the price of the others, or that the acceptance by de-

fendants of all kinds was a consideration for the undertaking of plaintiffs to deliver any of them. The discount of the prices was fixed with reference to the time of payment, and not the amount of the order. There is nothing to indicate that plaintiffs would not have taken an order for one or more of the items on the same terms as one for the whole.

Our conclusion is that the contract was severable, at least as to the different styles of goods, so as to permit defendants to accept those which were according to the samples, and to reject those that were not; and such, we think, would be the general understanding of merchants.

We have not overlooked the fact that of one style of ties, of which the order was for eleven dozen, the defendants retained eight, and returned three. Whether the contract was severable on this line it is unnecessary to consider, for, even if it was not, it would only go to the liability of defendants for three dozen; and evidently it was not on this ground that the trial court decided the case. Some stress is laid on the fact that the goods were all shipped together, but this fact is of no controlling weight. Of course, if the parties had agreed that the goods were to be shipped by installments, that would have been an additional circumstance tending to show that they intended the contract to be severable on another line.

Order reversed.

Buck, J., absent, sick, took no part.

(Opinion published 58 N. W. 988.)

OLIVER R. HARRIS *vs.* WILLIAM MCKINLEY *et al.*

Argued by appellants, submitted on brief by respondent April 28, 1894. Reversed May 7, 1894.

No. 8430.

Parties to contract.

A person other than the vendee named in an executory contract for the sale of real estate cannot, by any parol acceptance of it as his own, make it a binding contract between himself and the vendor.

Appeal by defendants, William McKinley and Frederick W. Paine, from an order of the District Court of St. Louis County, *D. B. Searle, J.*, made April 27, 1893, denying their motion for a new trial.

Defendants owned eighty acres of land in Douglas County, Wis., and employed the plaintiff, Oliver R. Harris, to sell it for them and agreed to pay him for his services if he made a sale five per cent on the first \$5,000 of the price and two and a half per cent on the residue. On November 14, 1890, Harris made an oral contract with Moses Stewart Jr. to sell to him the land for \$8,000. He reported this to defendants and they made and signed a contract of sale to Stewart. Harris took it to him and he objected to having his own name appear as purchaser and wanted his brother's name inserted instead. Harris took the contract back to defendants and they altered it by inserting the name of Charles W. Stewart in place of Moses Stewart Jr. and Harris delivered it to Moses as thus altered. It was never signed by Charles W. Stewart or by Moses Stewart Jr. It was in substance as follows:

Received of C. W. Stewart \$800 on account of purchase of W. $\frac{1}{2}$ N. E. $\frac{1}{4}$, Sec. 35, T. 48, R. 13, in Douglas County, Wis. Sold for \$8,000 upon the following terms, one third cash, of which above mentioned earnest money is a part; balance after deducting four mortgages aggregating \$2,133.33 now on the property to be secured by mortgage on the land payable in one and two years with eight per cent interest payable annually. The purchaser agreeing by the acceptance hereof to purchase the property on the terms aforesaid. A reasonable time not exceeding fifteen days allowed to close this trade. Time is made the essence of the agreement.

Harris brought this action to recover his commission \$325 for selling the land. At the trial he testified that the purchaser whom he secured was Moses Stewart Jr., and that Moses paid the earnest money but that Charles W. Stewart's name was inserted in the contract. The contract was produced and marked Exhibit A. W. F. McKay testified that he was a clerk in the office of Moses Stewart, Jr. and on the day of its date he put this contract away in a wallet and put the wallet in the office vault, that Charles W. Stewart had desk room in the office and that three or four weeks afterwards witness handed the contract to Charles W. Stewart when he asked for it.

The Judge charged the jury that if Charles W. Stewart accepted and adopted the contract he was bound by it although it was not signed by him. That as the contract was made in West Superior the law of Wisconsin governed the parties to it. The Judge further charged as follows:

If you believe from the evidence that this was not a contract or transaction between Charles W. Stewart and the defendants but was a transaction between Moses Stewart Jr. and the defendants, he using the name of his brother and himself paying the earnest money and adopting the contract as his contract then it would be a binding contract on his part. To this charge the defendants excepted. The jury returned a verdict for plaintiff for \$325. The defendants moved for a new trial. Being refused they appeal.

Jaques & Hudson, for appellants.

Moses Stewart Jr. could not be bound by a contract which he expressly declined to enter into and took particular pains to avoid liability upon. What object could he have had in arranging that the contract should run to his brother unless it was to escape personal liability himself. These defendants could not bring suit for specific performance upon this contract against Moses Stewart Jr., as he never entered into the contract. There is no evidence in the case showing even an oral agreement on his part to purchase the land. He expressly declined to be bound by this contract. This instruction to the jury misled them to think that because Moses Stewart Jr. paid the earnest money he had accepted or adopted the purchase.

Parol testimony cannot be heard to disclose who is the vendee in such a contract or to show a different vendee from the one named therein. To permit it would be to permit a writing to be contradicted by parol. *Clampet v. Bells*, 39 Minn. 272; *Morton v. Stone*, 39 Minn. 275.

Moer & Harris, for respondent.

This was a Wisconsin contract. It was made in that state regarding land lying there. Under the Wisconsin cases the acceptance or ratification of the contract was sufficient though the contract was not signed by the proposed purchaser, Charles W. Stewart. *Vilas v. Dickinson*, 13 Wis. 488; *Lowber v. Connit*, 36 Wis. 176; *Hutchinson v. Chicago & N. W. Ry. Co.*, 37 Wis. 582; *Schweitzer v. Connor*, 57 Wis. 177; *Bamber v. Savage*, 52 Wis. 110.

Knowledge of the contract was brought home to Chas. W. Stewart and there being no evidence that he disaffirmed it, an acceptance and ratification may be inferred. Further Chas. W. Stewart brought an action on this contract to recover the \$800. This of itself without other evidence is proof of a ratification of the contract. If a party does not disapprove the acts of one who assumes to be his agent, as soon as he can after those acts come to his knowledge, he makes the acts his own. *Woodbury v. Larned*, 5 Minn. 339; *Stearns v. Johnson*, 19 Minn. 540; *Lowry v. Harris*, 12 Minn. 255.

The evidence shows an acceptance and ratification of the contract on the part of Chas. W. Stewart and it became immaterial whether or not the instruction to the jury was erroneous or not, as the court should have charged as a matter of law under the uncontradicted evidence that an acceptance and ratification of the contract had been shown as against Chas. W. Stewart. The jury by their verdict determined all the questions in the case in favor of plaintiff and unless there was prejudicial error the verdict must stand.

MITCHELL, J. Action to recover the commission on the sale of defendants' real estate situated in Wisconsin.

The allegations of the complaint are that defendants employed the plaintiff as agent to procure a purchaser for the property, and that he procured such purchaser in the person of one Charles W.

Stewart, whom defendants accepted, and with whom they entered into a contract for the sale of the property.

The answer, after denying the allegations of the complaint, alleges, in substance, that they employed, not plaintiff, but the firm of Harris Bros. (of which the plaintiff was a member), and that the terms of the contract were that the firm was not to have any commission unless a sale was consummated by a conveyance of the property and the payment of the purchase money; that no sale ever was consummated, although defendants have always been ready, willing, and able on their part. The answer also sets up a written agreement (Exhibit A) to sell, which the defendants had signed, and delivered, as they allege, to Harris Bros. Under the evidence the verdict is conclusive that the contract of employment was with plaintiff, and that its terms were as alleged in the complaint.

The case was tried and submitted to the jury in the court below, and was argued in this court by both parties, upon the theory that to entitle plaintiff to his commission he must have procured the customer to enter into a binding and enforceable contract with defendants for the purchase of the property; and on the facts of the case this was undoubtedly correct, for the defendants intrusted to plaintiff the entire matter of closing the contract with the purchaser, whom they never saw. Charles W. Stewart never signed Exhibit A or any other memorandum. It was assumed by the trial court (on what authority is not stated) that, under the decisions of this court, such a contract would not be binding on the purchaser unless signed by him; and the case was submitted to the jury on the theory (the correctness of which is not questioned by either party) that the transaction was governed by the law of Wisconsin, and that in that state, if such a contract is signed by the vendor, and accepted and adopted by the vendee, it is binding and enforceable against the latter, although not signed by him. It is not important to consider whether the court was right in his view of the law of this state, for the law of Wisconsin is unquestionably as stated. *Vilas v. Dickinson*, 13 Wis. 488; *Lowber v. Connit*, 36 Wis. 176; *Hutchinson v. Chicago & N. W. Railway Co.*, 37 Wis. 600; *Schweitzer v. Connor*, 57 Wis. 179, (14 N. W. 922.)

In the present case there was not a particle of evidence to show

a parol acceptance of the contract by the vendee until after plaintiff's connection with the transaction had terminated; and there is no evidence of any authority on the part of either plaintiff or Moses Stewart to make any such contract in his behalf. The only evidence relied on to show an acceptance is that, some weeks after the contract came into the hands of Moses Stewart, Charles W. Stewart asked a clerk in the office of the former for the contract (for what purpose does not appear), and that, in pursuance of such request the clerk gave it to him; and the further fact (which came out incidentally in the testimony of one of the defendants) that Charles W. Stewart had brought suit in Wisconsin against them to recover back the \$800 earnest money paid by Moses Stewart at the time of the delivery of Exhibit A to him.

It is certainly at least doubtful whether this very meager and equivocal evidence would have warranted the jury in finding that Charles W. Stewart had accepted and adopted the contract so as to make it binding on him. Clearly, it was not so strong as to require any such finding; the very most that could be claimed for it being that it made a case for the jury.

In this state of the evidence the court instructed the jury, in substance, that if they believed from the evidence that the transaction for the purchase of the property was really between defendants and Moses Stewart, and that the latter was the real principal, but used the name of Charles W. Stewart as the person to whom the contract should run, and that he (Moses) paid the earnest money, and accepted and adopted the contract as his own, although running to Charles W., then it was a binding and enforceable contract against him. In other words, it was left to the jury, although they might find that Charles W. Stewart had never become bound by the contract, to determine whether Moses Stewart had not accepted it so as to bind him. How, under any circumstances, Moses Stewart could have accepted, so as to be bound, a contract executed to another party, and which he himself had declined to enter into, it is difficult to see. The contract was one which was required, so far at least as defendants were concerned, to be in writing, and by that writing the only person to whom they bound themselves was Charles W. Stewart. Moses Stewart could not compel a conveyance. This instruction was er-

roneous, and was clearly prejudicial, because the jury might have found for the plaintiff on the ground that he had procured Moses Stewart to enter into a binding and enforceable contract with defendants for the purchase of the land. For this reason, if no other, a new trial must be granted.

Order reversed.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 991.)

PINE COUNTY vs. EZRA F. LAMBERT.

Argued April 30, 1894. Reversed May 7, 1894.

No. 8904.

Former decisions followed to the effect:

Requisites of a valid sale to the state under a tax judgment.

That under Laws 1881, ch. 135, the state acquired no title to the land by virtue of the tax judgment, unless it was offered for sale, and bid in for the state in default of other bidders.

Statute of limitations of actions applies to proceedings to enforce the collection of taxes.

That proceedings to enforce the collection of taxes against real estate are "an action upon a liability created by statute," within the meaning of 1878, G. S. ch. 66, § 6.

Case certified from the District Court of Pine County, *F. M. Crosby, J.*, in proceedings under Laws 1893, ch. 150, to enforce payment of delinquent real estate taxes in that county.

Ezra F. Lambert appeared and answered that he owned five hundred and sixty acres of the land describing it located near Sandstone Junction against which judgment was demanded for the taxes of the year 1879 and prior years and interest to the amount \$4,553.40. For defense he alleged that a valid tax judgment was recovered on August 8, 1881, in the district court under Laws 1881, ch. 135, for all these taxes and that more than ten years had since elapsed before the commencement of the present proceeding. He claimed

57	208
66	527
57	208
70	289
57	208
78	107
57	208
179	132
79	387
57	208
d85	882

that the tax judgment of August 8, 1881, was barred by 1878 G. S., ch. 66, §§ 5, 6, subd. 2. The sale in September, 1881, under that judgment was admitted by both parties to be irregular and invalid. At the trial these facts were shown by the records or admitted by stipulation of the parties. The court overruled the claims of Lambert and ordered judgment against the lands for the amount of the taxes, interest, penalties and costs, saying:

No action upon a judgment against land for the payment of taxes can be maintained. This is a proceeding to enforce an obligation to pay taxes, which comes within the principles laid down in *County of Redwood v. Winona & St. P. Land Co.*, 40 Minn. 512. There is no statute of limitation that applies. If it should be regarded as a proceeding to enforce a liability created by statute, that liability was not created until the enactment of Laws 1893, ch. 150.

Lambert feeling aggrieved applied to the court to report the case to this court pursuant to 1878 G. S. ch. 11, § 80. The court being of opinion that the point was likely to arise frequently made a brief statement of the facts established and of its decision and transmitted the same to this court.

W. H. Grant and J. F. Fitzpatrick, for Lambert.

The only point raised by the answer is the application of the statute of limitations. That this is an action upon a judgment can scarcely admit of controversy, and the only reason for referring to that point is, that the court below in its decision says that it is not such an action. It was admitted in evidence on the trial that the proceeding was based on the tax-judgment of August 8, 1881. Not only was the proceeding in fact based upon the judgment, but under Laws 1893, ch. 150, no proceeding was authorized unless judgment had been obtained. All the prior proceedings to collect the taxes against these lands were merged in that judgment of 1881; *Farnham v. Jones*, 32 Minn. 7; *Mulvey v. Tozer*, 40 Minn. 384; *Gilfillan v. Chatterton*, 38 Minn. 335.

The most that can be claimed for the state in this proceeding is that it has an unsatisfied judgment against this property entered in the year 1881. Such a judgment is subject to the statute of limitations. 1878 G. S. ch. 66, §§ 5, 12; *County of Redwood v. Winona & St. P. Land Co.*, 40 Minn. 512.

Robert C. Saunders, County Attorney for Pine Co.

The legislature of the state of Minnesota never at any time or under any circumstances contemplated the application of the statute of limitations to proceedings to enforce the payment and collection of taxes. At the time of the enactment of 1878 G. S. ch. 66, § 12, in 1851, there were no proceedings by suit to enforce payment of delinquent taxes.

Coming to the real question in this proceeding we contend that the decisions in *County of Redwood v. Winona & St. P. Land Co.*, 40 Minn. 512, and *Mulvey v. Tozer*, 40 Minn. 384, and *Mower County v. Crane*, 51 Minn. 201, can and should be distinguished from the present case and that they are not applicable to the sole point here raised.

It is respectfully but earnestly and conscientiously urged upon this court, that the Redwood County case is not good law and should be reversed. It has not yet become an important rule of property. It is adverse to public interest and policy.

MITCHELL, J. This case is fully covered by former decisions of this court. We have held that the state acquired no title to the land by virtue of a tax judgment under Laws 1881, ch. 135, unless offered for sale as provided in section 4, and bid off for the state in default of other bidders. *Gilfillan v. Chatterton*, 38 Minn. 335, (37 N. W. 583;) *Mulvey v. Tozer*, 40 Minn. 384, (42 N. W. 387.)

The agreed facts are that these lands were never sold under the tax judgment, "and no entry of any description thereof was made in the tax judgment book, or in the copy thereof in the hands of the county auditor." This means that they were not "bid in for the state." Indeed, it does not appear that the lands were even offered for sale. Hence, the most that can be claimed for the state is that it had an unsatisfied tax judgment against the land, rendered in 1881. And whether this proceeding, commenced under Laws 1893, ch. 150, be deemed one on the judgment, or one to enforce the collection of the same taxes for which the judgment was rendered, it is, in either view, barred by the statute of limitations, which runs against the state the same as against individuals. 1878, G. S. ch. 66, § 12. If it be deemed the former, it is barred by the ten-

years limitation of 1878, G. S. ch. 66, § 5, and, if it be deemed the latter, then it is barred under the six-years limitation of subdivision two of section 6 of the same chapter, as "an action upon a liability created by statute." *County of Redwood v. Winona & St. P. Land Co.*, 40 Minn. 512, (41 N. W. 465, 42 N. W. 473;) *Mower Co. v. Crane*, 51 Minn. 201, (53 N. W. 629.)

And, inasmuch as the right was extinguished before the act of 1893 was enacted, it was not in the power of the legislature to revive it. *Kipp v. Johnson*, 31 Minn. 360, (17 N. W. 957.) We have been urged to consider the serious consequences which it is alleged will result from adhering to and following our former decisions on this subject. It might be suggested, in reply, that these consequences might have been avoided if public officers had performed their duty, or if the legislature had enacted remedial legislation before the statute of limitations had run. The state, having slept on its rights for twelve years, must take the consequences.

The order overruling the defense, and directing the entry of judgment against the land, is reversed, and the proceedings remanded.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 990.)

WILLIAM OXFORD *vs.* NICHOLS & SHEPHERD CO.

Argued by respondent, submitted on brief by appellant, April 24, 1894. Reversed May 8, 1894.

No. 8692.

Verdict not supported by the evidence.

Evidence held insufficient to justify a finding that the execution of an instrument was procured by fraud. CANTY, J., dissenting.

Appeal by defendant, Nichols & Shepard Co., a corporation, from a judgment of the District Court of Nobles County, *P. E. Brown, J.*, entered March 3, 1893.

EXHIBIT D.

Worthington, Minn., October 11, 1890.

Nichols & Shepard Co., Battle Creek, Mich: Please ship for the undersigned in care of Azom Forbes, Worthington, Minn. at once one of your improved No. 21 Steam Outfits consisting of No. 6 Separator and a ten horse wood and coal burning steam engine mounted on wheels, with 150 feet rubber belt. The undersigned agrees to receive said machinery on its arrival subject to all the conditions of the warranty and agreement printed below, and pay in cash the freight and charges thereon from the factory and also agrees to pay the further sum of \$1,625 in notes bearing interest as follows: \$200 due Dec. 1, 1890; \$500 due Dec. 1, 1891; \$500 due Dec. 1, 1892; \$425 due Dec. 1, 1893. The undersigned agrees to fully settle for the machinery before it is delivered to him by paying freight and giving said notes and a mortgage on said machinery, and also on two mules, two horses, three colts coming two years old, and second mortgage on four other work horses. This machinery is ordered subject to the following warranty and agreement, and none other; viz: That the separator is well made, and of good materials, and with good management is capable of doing a good business in threshing, separating and cleaning grains and seeds. That the engine is well made and of good materials, and if properly run and rightly managed is capable of driving said separator to do a good business in threshing. Conditioned that upon starting this machinery the undersigned purchaser shall intelligently follow the printed hints, rules and directions. If by so doing he is unable to make it operate well, written notice wherein it fails to satisfy the warranty, is to be immediately given to Nichols & Shepard Co. at Battle Creek, Mich., and also to the dealer through whom purchased, and reasonable time allowed to get to it and remedy the defect (if any) unless it is of such a nature that they can advise by letter, and the purchaser hereby agrees to render necessary and friendly assistance.

Deficiencies in general adaption of the engine for developing the rated power, and of the separator for threshing, separating and cleaning, are expressly agreed by the undersigned to be reported in writing, as above stated within five days after starting it and not after continued use or injury to the machinery, and it is hereby expressly agreed that use without such written notice is conclusive evidence of satisfaction and fulfillment of all warranty.

If any part of said machinery except belting fails during this year in consequence of any defect in material of said part, Nichols & Shepard Co. have the option to repair the same or to furnish a duplicate of said part free of charge except freight, after presentation of the defective piece to the dealer through whom the machinery was bought, but deficiencies in any pieces not to condemn other parts.

On October 11, 1890, plaintiff, William Oxford, executed and delivered the foregoing order, Exhibit D., to Azom Forbes, the agent of defendant. The threshing outfit arrived and was delivered by Forbes to plaintiff on October 22, 1890, and on that day plaintiff made and delivered the notes and chattel mortgage mentioned in the order. He failed to make the threshing outfit work satisfactorily and notified defendant and it sent agents and experts from time to time to remedy defects but failed to do so. But plaintiff kept the outfit until September, 1891, when he delivered it back to the agent, Forbes, and demanded his notes. A few days thereafter the defendant sent out and took the horses, mules and colts under the mortgage and was about to sell them at public auction pursuant to a power in the mortgage when Oxford commenced this action of replevin and had the property redelivered to him. He claimed that Forbes as agent of defendant orally warranted the threshing outfit to be well made and of good material and that it would do good work, threshing all kinds and conditions of grain, flax and timothy seed, and do as good work as any steam outfit in the market and was safe to use on a farm. If it failed the defendant would on notice remedy any defect and if it could not be made to work to his satisfaction, the defendant would take it back and return the notes. He further claimed that he never received any written or printed warranty and did not know that a warranty was in the order he gave, that he was induced by deceit and fraud to sign the order without reading it. Defendant answered and the issues were tried and verdict rendered for the plaintiff. A motion for a new trial was denied and judgment was entered that plaintiff, William Oxford, is the owner and entitled to the possession of the chattels replevied and that he recover \$68.33 costs. Defendant appeals. The discussion here was upon the evidence whether or not it was sufficient to sustain the verdict.

George W. Somerville and J. A. Town, for appellant.

George W. Wilson, for respondent.

GILFILLAN, C. J. There was no evidence that would justify a finding of a contract between the parties subsequent to the written contract. It could not be claimed that, with Exhibit D in force,

there would be any basis for the action. All prior and contemporaneous negotiations and parol agreements on the matters covered by that contract were of course merged in it. Unless, therefore, the plaintiff claims that his signature to that contract was fraudulently obtained, his action must fail.

On that point we do not think there was evidence sufficient to make it a question for the jury. There is nothing on the point but the testimony of plaintiff, and, to state that most strongly in his favor, there had been a prior oral agreement for a warranty more favorable to him than that in Exhibit D. That exhibit was made up by filling with a pen blanks in a printed form containing the order for the machine and the warranty, the latter being in somewhat smaller type than the former, though not so small as to be difficult to read, and it was the last thing before, and immediately over, the place for the plaintiff's signature. After it was filled up, plaintiff went into the office of defendant's agent to sign it. It was getting to be dark, and there was no lamp lighted, though he does not state the hour. Another witness says 5 o'clock, October 11th. Plaintiff picked up the paper, and held it in his hands as though reading it, when one Ramage, who appears to have been a clerk of defendant's agent, said to him that it was only the order for the machine; when plaintiff, without reading it, laid it down on the table, and signed it.

To make out a case of fraud, it must appear that Ramage said to plaintiff that the paper was only the order for the machine, with the fraudulent intent to induce him to sign the paper without knowing its contents. Under the circumstances, a jury would not be justified in concluding there was such fraudulent intent. The paper was just what Ramage said,—an order for the machine, containing conditions upon which it was to be delivered and received. If, as said in *McCall v. Bushnell*, 41 Minn. 37, (42 N. W. 545,) "the instrument itself, knowingly executed, becomes a strong 'wall of evidence,' not to be lightly overcome by unsatisfactory oral testimony," a verdict against the instrument on such evidence as the foregoing cannot be sustained.

Judgment reversed.

BUCK, J., absent, sick, took no part.

v.57M.—14

CANTY, J. I dissent from the foregoing opinion, and am of the opinion that there is sufficient evidence to sustain the verdict. Plaintiff purchased from defendant a threshing machine and engine. His testimony is that the contract was oral, and included a warranty and a right to return the machine if it failed to do good work; and, after notice, the defendant failed to make it do good work. He mortgaged other personal property as security for the purchase price. He and the defendant both failed to make the machine do good work, and he returned it. The defendant then took possession of the mortgaged property under the mortgage, and plaintiff brought replevin.

Upon the trial defendant produced a written order for the machine, following which, on the same paper, and printed in small type, is a contract of purchase of the machine, reciting the warranty the purchaser received with it, which is wholly different from the oral warranty which he claims, and contains no clause giving him the right, after trial, to return the machine.

In impeachment of this instrument, plaintiff testified that in the office of the agent, late one evening, the clerk of the agent filled out a paper; that it was quite dark; there was no light in the room, and he could not see to read when the paper was given him. That he took up the paper to read it, and the clerk told him it was nothing but an order for the machine. Again, he says: "He seemed to be in a hurry, and he spoke; he said it was about time to go home, and he says, 'It is nothing but an order for the machine.'" "I had it only while it was lying on the desk. I picked it up in my hand, and he told me what it was, and I just put it down and signed it. I could hardly see to write in there. Q. Why didn't you read it? A. Because it was quite late in the evening, and Ramage said what it was."

The witness also testified that some time after he signed this order, and when the machine arrived, in a conversation with the agent "I asked him for a warranty, and they told me they would send me one; when they sent these papers to Fulda, they would send one with it in the letter." "I asked him for a warranty, and he said that they had no printed one, but would send me one in the letter, and the warranty was to be the same as he had stated

before; it should do good work in all kinds of grain, or I could return it."

It seems to me the evidence was sufficient to go to the jury to impeach the written instrument for fraud. When the parties stand on an equal footing, and the party claiming fraud is able to read, and no artifice is used to prevent him from reading the instrument he is about to sign, his own negligence in failing to read it is the substantial cause of his injury. But each case must stand on its own peculiar circumstances where there are such circumstances in the case. Where some artifice is fraudulently used to prevent his reading the instrument, and there is also a difficulty in the way of his reading it, as that it is too dark to see to read it at the time and place, and the objectionable matter is in fine print, and, as in this case, where he alone was to sign the instrument, and this objectionable matter was a provision which he might naturally expect should be signed by the opposite party, and not by him, it seems to me that his negligence and defendant's fraud were both questions for the jury.

Fraud must be proved by circumstantial evidence. The fraudulent intent is usually a mere inference. It is a question for the jury whether the clerk, Ramage, said what he did when plaintiff picked up the instrument to read it, for the fraudulent purpose of preventing him from reading it, and whether Ramage took advantage of the darkness and the fine print to aid him in accomplishing his purpose, and also took advantage of the fact that plaintiff might naturally suppose that the warranty from the defendant to him should be signed by the defendant, and not by him. While the evidence is certainly not very strong as a question of law, it is sufficient to sustain the verdict. In my opinion, the order appealed from should be affirmed.

(Opinion published 55 N. W. 865.)

ARNY GRUNDYSEN vs. POLK COUNTY.

Argued April 23, 1894. Affirmed May 8, 1894.

No. 8 95.

Cancellation of uncollectible personal taxes.

The board of county commissioners has no authority to cancel personal taxes until there is delivered to it, by the clerk of the District Court, the sheriff's list of uncollected taxes, and affidavit, as required by 1878, G. S. ch. 11, § 59, as amended by Laws 1885, ch. 2, § 6.

Sheriff's fees for constructive mileage.

When the sheriff receives the warrants for delinquent personal taxes, he cannot charge the county for constructive mileage on those uncollected, but can charge only for the distance actually and necessarily traveled on all of those uncollected, for which travel he has not received pay on those collected.

Appeal by plaintiff, Arny Grundysen, from an order of the District Court of Polk County, *Frank Ives, J.*, made March 22, 1894, denying his motion for a new trial.

On April 1, 1893, the treasurer of Polk County made a list of delinquent personal property taxes for the year, 1892, and delivered it to the clerk of the District Court of that county pursuant to 1878 G. S. ch. 11, § 58, as amended by Laws 1885, ch. 2, § 5. The clerk thereupon issued his warrants to plaintiff who was then sheriff of that county directing him to proceed to collect the same. On June 1, 1893, the sheriff made and filed with the clerk a list of the taxes he was unable to collect, with his affidavit that he had made diligent search and inquiry for goods and chattels wherewith to make such taxes and was unable to collect the same. There were one hundred and fifty nine of these unpaid warrants. On June 5, 1893, the sheriff presented to the board of county commissioners his bill for travel and for service of these unpaid warrants, as follows: for travel 7,030 miles at seven and a half cents per mile, \$527.25; for service of 159 warrants at seventy five cents each, \$119.25. Total, \$646.50. The board on July 10, 1893, allowed \$184.45 thereof and disallowed the residue. The sheriff appealed to the District Court,

pursuant to 1878 G. S. ch. 8, §§ 89, 90, where pleadings were made, a jury waived and the issues tried August 22, 1893.

The County Attorney in behalf of Polk County claimed by the answer that the board of county commissioners had on March 29, 1893, abated and cancelled the personal property taxes against thirty six of the persons named in these tax warrants and that the warrants against them were illegally issued, and that the sheriff knew these facts and took those thirty six warrants solely to make fees. He also claimed that the mileage charged on the remaining one hundred and twenty three warrants was mainly constructive, never in fact travelled. At the trial the sheriff was a witness and testified that the travel he charged was computed on each of the 159 warrants separately from the county seat to the residence of the tax debtor and return, making 7,030 miles. That the actual distance travelled on the 123 warrants starting from the county seat and going to the nearest and then to the next and so on until all were served was 1,800 miles and on the 36 others 250 miles. The trial court made findings and allowed for the number of miles actually travelled on all the warrants \$153.75, and for serving the 159 warrants \$119.25, making a total of \$273. This was seventy five per cent of the usual sheriff's fees. Sp. Laws 1891, ch. 424, § 12. No costs were allowed to either party. The sheriff, Arny Grundysen, moved for a new trial. He was refused and he now appeals to this court.

William Watts and H. & R. L. Johns, for appellant.

The board of county commissioners has no authority to cancel personal property taxes, before warrants for their collection have been issued and returned uncollectible. The clerk properly issued the warrants and it was the duty of the sheriff to serve them.

The sheriff is entitled to mileage on each tax warrant placed in his hands for collection, from the county seat, or if served by his deputy, from the place of the residence of such deputy to the place of making distress. By Sp. Laws 1891, ch. 424, § 12, the sheriff of Polk County is only allowed seventy five per cent of the usual sheriff's fees. *Schmid v. County of Brown*, 44 Minn. 67; *Knicker-backer v. Shipherd*, 3 Cow. 383; *Gulf, C. &c. Ry. Co. v. Dawson*, 69 Tex. 519; *McGee v. Dillon*, 103 Pa. St. 433.

A. R. Holston, County Attorney, for respondent.

The board, right or wrong, cancelled the tax on the records of the county and the clerk could not thereafter legally issue, nor could the sheriff receive, the warrants against the persons whose taxes had been so cancelled. Both clerk and sheriff knew of such cancellation and that the taxes so cancelled were for the most part uncollectible, yet they proceed to go through the form of collecting the same for the sole purpose of making a bill for fees against the county.

The trial court held that when the sheriff visited a delinquent in any particular locality he should take with him the warrants and serve on all the delinquents in that particular vicinity and in that direction who might be conveniently reached by the sheriff on one journey from the county seat.

In an unsuccessful attempt to execute a tax warrant no mileage can be recovered. *Titman v. City of New York*, 60 Hun, 123; *Logan Co. v. Doan*, 34 Neb. 104; *Redfield v. Shelby Co.*, 64 Ia. 11; *Burlington & M. R. Co. v. Beebe*, 14 Neb. 463; *Barnes v. Marion Co.*, 54 Ia. 482.

The case of *Schmid v. County of Brown*, 44 Minn. 67, is not in point. The question was not there raised as to the sheriff's right to charge mileage on each separate warrant. His bill in that particular was not disputed.

GILFILLAN, C. J. The first question is: When may the board of county commissioners cancel personal taxes? They have no authority to do it at all, except as it is conferred by statute. The clerk of the District Court issues to the sheriff the warrants for collecting delinquent personal taxes, and, if the latter cannot find property out of which to collect them, he is required to file with the clerk a list of them, with an affidavit of himself or deputy that he has made diligent search and inquiry for goods and chattels where-with to make such taxes, and was unable to make or collect the same. "The clerk shall deliver such list and affidavit to the board of county commissioners at their first session thereafter, and they shall cancel such taxes as they are satisfied cannot be collected." 1878, G. S. ch. 11, §§ 58, 59, as amended by Laws 1885, ch. 2, §§ 5, 6.

And this is the only authority in the statute to cancel. It is clear enough the legislature did not intend to vest in the board the somewhat dangerous power to cancel a personal tax until a *bona fide* effort to collect it in the usual way has proved ineffectual.

The next question is: May the sheriff charge the county fees for constructive travel in endeavoring unsuccessfully to collect taxes on the warrants issued to him? That is, if he have warrants against ten different persons living in the same place, and actually travels only ten miles to execute them, may he charge the county for one hundred miles' travel?

However it may be when a sheriff or constable has different writs, for different persons, in independent proceedings, and serves all of them at the same place, in respect to his right to charge upon each for mileage to and from that place, though he makes but one trip for all, we think the sheriff who receives the tax warrants at the same time (as all ought to be issued at the same time) on behalf of the same person, to wit, the county, in the same general proceeding, to wit, the enforcement of personal taxes, can charge the county mileage only for the distance actually and necessarily traveled by him upon all of those uncollected, for which travel he has not received pay on those collected.

The question of pay for constructive travel was not presented in *Schmid v. County of Brown*, 44 Minn. 67, (46 N. W. 145.)

Order affirmed.

Buck, J., absent, sick, took no part.

(Opinion published 58 N. W. 864.)

PAUL SHARVEY vs. CENTRAL VERMILLION IRON Co. et al.**Argued May 4, 1894. Affirmed May 8, 1894.****No. 8782.****Sheriff's fees on a sale by him on execution.**

When a sheriff levies an execution and sells the property, the execution creditor being the purchaser, it is a collection of the amount of the bid, within the meaning of 1878 G. S. ch. 70, § 11, allowing sheriffs a percentage for collections on executions.

Appeal by defendants, the Central Vermillion Iron Company, Emil Hartman and Richmond D. Mallett, from an order of the District Court of Ramsey County, *Hascal R. Brill, J.*, made November 11, 1893, denying their motion for a new trial.

Albert Sheffer obtained a judgment in the District Court of Ramsey County against the Iron and Land Company of Minnesota (Limited), a corporation, for \$760,000 and it was docketed also in St. Louis County. Sheffer assigned the judgment to the Central Vermillion Iron Company, another corporation, and it caused a writ of execution to be issued thereon and delivered to the plaintiff, Paul Sharvey, Sheriff of St. Louis County. Under it he levied upon real estate and after due advertizement sold it at public auction to the Central Vermillion Iron Company for \$250,000 and gave it his certificate of sale. In part payment of the sheriff's fees on the execution this corporation gave him its note for \$2,000 indorsed by the other defendants dated July 8, 1892, and due in six months. The note was not paid but was protested for non payment and notice given the indorsers. This action was brought upon the note. Defendants answered that no money was paid on the sale except for disbursements and \$500 to the sheriff on his fees; that the note was exacted by the plaintiff before he would deliver the certificate; that the \$500 actually paid to him on the sale was more than his lawful fees; that the note was in fact without consideration. At the trial October 26, 1893, these facts were substantially admitted and the court ordered judgment for the plaintiff for the amount of the note. Defendants moved for a new trial. Being denied they appeal.

W. H. Williams, for appellant.

The only question in this case is whether the sheriff is authorized to charge a percentage on the bid of the judgment creditor in a sale of land under execution under the circumstances of this case, whether such a bidding in of land by the judgment creditor is a collection by the sheriff within the meaning of 1878 G. S. ch. 70, § 11. The sheriff is not entitled to percentage when he is prevented from making the collection through no fault of the judgment creditor. *Campbell v. Cothran*, 56 N. Y. 279; *Peck v. City Nat. Bank*, 51 Mich. 353; *Vance v. Bank of Columbus*, 2 Ohio, 214; *Coleman v. Ross*, 14 Oregon, 349.

The sheriff cannot lawfully demand or compel plaintiff to pay over the amount of his bid in money where he becomes the purchaser and where he is entitled to receive it back again at once. *Nichols v. Ketcham*, 19 Johns. 84; *Coleman v. Ross*, 14 Oregon, 349; *Fowler v. Pearce*, 7 Ark. 28; *Russell v. Gibbs*, 5 Cow. 390.

Commission was not allowed at common law. It depends on the statute. The court will be slow to allow it, unless the statute clearly provides for it. The statute especially in all cases of doubt will be construed strictly against the sheriff. *Jackson v. Siglin*, 10 Oregon, 93; *Preston v. Bacon*, 4 Conn. 471.

The compromise which resulted in the giving of the note in suit will not avail respondent, if the fee charged was illegal in the first place. *Churchill v. Perkins*, 5 Mass. 541; *Gilmore v. Lewis*, 12 Ohio, 281.

Billson Congdon & Dickinson, for respondent.

The fact that our statute authorizes a commission on moneys paid in settlement at any time after levy, evidently including as it does settlements made directly with the creditor, is proof positive that the commission is not under our laws to be regarded as compensation for handling the money.

The learned counsel for the appellants has entered freely upon the perilous attempt to settle the meaning of the statute of one state by citing as authority decisions under the utterly different statutes of other states. All of his cases have arisen under statutes broadly distinguishable from our own.

GILFILLAN, C. J. The corporation defendant owned a judgment against the Iron & Land Company of Minnesota, caused execution thereon to be issued to the county of St. Louis, and delivered it for execution to plaintiff, who was sheriff of that county, and gave him a list of lands of the judgment debtor on which to levy. He levied on the lands in the manner provided by statute, advertised and sold them, said defendant bidding them in, and plaintiff returned the execution with the amount of the bid credited on it.

The question is, was he entitled to receive from said defendant the percentage on the amount bid as upon a "collection on execution," under 1878, G. S. ch. 70, § 11? Was it a collection within the meaning of that statute?

We think it has always been the general understanding of the bar that such is the case.

When an execution creditor bids upon the property levied on, he bids as any one else does, except that, if it be struck off to him, to avoid circuity of action, and as matter of convenience, he is not required to go through the ceremony of paying the money to the sheriff and receiving it back from him. But he is presumed, as any one else would be, to bid the property off at what he deems to be its value; and there is secured to him, by means of the execution and sale, the amount of the bid, less the fees and expenses, by acquiring the title to the property if the sale become absolute, and by actual receipt of the money if there be redemption. Whatever he acquires by the execution and sale is to be deemed a collection, not only as between him and the judgment debtor, but as between him and the sheriff. If this were not so, execution creditors might in many cases profit by defeating the sheriff's just claim to fees. In this case the property was struck off to defendant at \$250,000. Suppose a third person had bid that amount, and the defendant had bid \$50 more, that being the highest bid, the sheriff would have been obliged to strike off the property to it, and, if he were not entitled to fees because the defendant bid off the property, it would make a very handsome profit by its raise of \$50.

There was a collection, within the meaning of the statute.
Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 864.)

JAMES H. BISHOP & Co. vs. BUCKEYE PUBLISHING Co. et al.

Submitted on briefs April 17, 1894. Reversed May 8, 1894.

No. 8377.

Order granting a new trial when the verdict is manifestly correct.

The preponderance of the evidence *held* to have been manifestly and palpably in favor of the verdict, so that an order granting a new trial for insufficiency of the evidence must be reversed.

Appeal by Buckeye Publishing Company, one of the defendants, from an order of the District Court of Hennepin County, *Seagrave Smith, J.*, made February 18, 1893, granting plaintiff's motion for a new trial.

The plaintiff, James H. Bishop & Co., a corporation, brought this action against defendants, John F. Travis and Buckeye Publishing Company, another corporation, upon two promissory notes each for \$568.95 dated July 5, 1888, and due one in three and the other in four months from that date. Both notes were made by Travis and were payable to the order of the Buckeye Publishing Company and were indorsed by it.

The Buckeye Publishing Company answered that on November 23, 1888, Travis paid both notes and that plaintiff on that day delivered both notes to Travis and by agreement between plaintiff and Travis both were cancelled; that on that day Jacob H. Cook made his note for \$3,000 payable to the order of William Cheney four months thereafter which note Cheney indorsed and transferred to Travis and he delivered it to plaintiff and received therefor the two notes in suit and plaintiff's note for \$1,796. The Buckeye Publishing Company did not know of or have anything to do with this transaction but were told and believed that the two notes in suit were paid. It appeared on the trial that Travis afterwards delivered to Cook the note for \$1,796 and the two notes in suit as security to him for making the note for \$3,000 for Travis' accommodation, and that Cook on July 2, 1890, gave them to plaintiff in satisfaction of his \$3,000 note. The jury returned a verdict for defendant. On motion of the plaintiff the court set the verdict aside and granted

a new trial. The defendant, Buckeye Publishing Company, appeals. The discussion here was upon the evidence.

Arctander & Arctander, for appellant.

Sutherland & Van Wert, for respondent.

GILFILLAN, C. J. It is conceded by the parties, and is also apparent from the record, that the court below granted the motion for a new trial solely on the ground that the verdict was not justified by the evidence. The question therefore is, was the preponderance of the evidence "manifestly and palpably" in favor of the verdict?

Upon a careful perusal of it, we cannot avoid the conclusion that it was. The sole question was, did the transaction in which the plaintiff delivered to the maker the notes made by Travis, and as indorser of which defendant is now sued, amount to a satisfaction of them, or an extinguishment of the defendant's (the indorser's) liability upon them. There is no dispute that in that transaction plaintiff, the holder, on a sufficient consideration surrendered its right to them, and delivered them to the maker. Upon those facts *prima facie* the notes were extinguished. The plaintiff, having subsequently got possession of them, must, before it can recover against the indorser, show that the transaction did not have that effect; and the only way it could show that was by proof that the transaction was a transfer, not to the maker, but to some one else, who could hold the notes as a liability of all the parties to them.

As to the transaction, there were but two witnesses,—Travis, the maker, and Bishop, plaintiff's president. The testimony of Travis was clear and distinct, and with every appearance of probability, that plaintiff accepted from Travis the note of one Cook, indorsed by one Cheney, in satisfaction of the notes in suit, surrendering them to him, and giving to him a note payable, at his request, to Cook, for the difference between the amount of the note received and those surrendered, making the ordinary case of a discharge of a debt by acceptance of the obligation of a third person. From the testimony of Bishop it may be gathered that it was understood to be the intention of Travis to deliver the surrendered notes to Cook, as security for his accommodation by the note made by him and delivered to Travis and by the latter to plaintiff, but there is nothing in his testimony indicating that Cook was a party to the

transaction, or that it was intended or understood to be a transfer of the notes by plaintiff to him. A finding on the testimony, though Travis' testimony be disregarded, that by that transaction they became the property of Cook, could not have been sustained.

Upon the surrender of the notes to the maker, they became, as obligations, extinct; and, although the maker might, so far as he was concerned, reissue them, he could not thereby revive the obligation of the indorser.

Order reversed.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 872.)

SIMON HEAVENRICH *et al.* vs. EDWARD H. STEELE.

Argued April 19, 1894. Affirmed May 8, 1894.

No. 8664.

Effect of a rescission of an accord and satisfaction.

Parties to an accord and satisfaction may, by a subsequent agreement, rescind the same, and restore the debt to its original status.

Appeal by defendant, Edward H. Steele, from an order of the District Court of Hennepin County, *Thomas Canty, J.*, made September 9, 1893, denying his motion for a new trial.

The plaintiffs, Simon Heavenrich and Samuel Heavenrich, of Detroit, Mich., sold goods to defendant, Edward H. Steele, of Minneapolis, and in August, 1888, he was indebted to them in the sum of \$5,079.30. He was insolvent and in that month made an assignment to Whipple Andrews of all his unexempt property in trust to pay his debts. Steele soon after proposed to his creditors to form a corporation to be called the Minneapolis Land and Mortgage Company. Each creditor to take stock to the amount of his

claim and that the assignee turn over to it all the assigned estate and be discharged and that the proceedings under the assignment be closed. This was assented to, the corporation was formed, the assignee turned over the property and was discharged and on December 13, 1888, plaintiffs received stock to the amount of their claim and released Steele from all personal liability. On January 31, 1889, the plaintiffs tendered back their stock and commenced an action in the District Court of Hennepin County to set aside and rescind the settlement on the ground of fraud and misrepresentations regarding the property of the corporation. Such proceedings were had that on February 13, 1889, a compromise was effected, the suit withdrawn, and Steele agreed to find a purchaser of plaintiffs' claim within six months from that date who would pay them \$3,500 for it. Plaintiffs agreed to accept that sum in full of all demands if paid within that time. The contract further provided that if that sum was not paid to plaintiffs within the six months, the indebtedness of Steele to them of \$5,079.30 should be revived and considered in force; meantime, plaintiffs were to hold the stock as collateral security for the indebtedness. Steele did not find a purchaser of plaintiffs' claim within the six months, nor did he or any one pay them the \$3,500 and they brought this action September 26, 1892, to recover of Steele the \$5,079.30 and interest. A jury was waived and the court made findings and ordered judgment for plaintiffs for that amount and interest and costs. Defendant moved for a new trial. Being denied he appeals.

George B. Spencer, for appellant.

Keith, Evans, Thompson & Fairchild, for respondents.

GILFILLAN, C. J. The findings of fact, including the sixth, as to which error is assigned, are fully sustained by the evidence.

On those findings, the only question is, can creditor and debtor, having made an accord and satisfaction, rescind the same, by a subsequent agreement, so as to restore the debt to its original status, and so that it may be sued without reference to the accord and satisfaction, or to the agreement rescinding it?

We can conceive of no reason why they cannot. It is true that by the accord and satisfaction, so long as it stands, the debt is

extinguished. But, when it is rescinded, matters stand as though it had never been made.

Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 982.)

Application for reargument denied May 22, 1894.

FRED ROGERS *et al.* vs. JONAS F. BROWN.

Argued May 3, 1894. Affirmed May 8, 1894.

57	228
82	246

No. 8670.

Findings sustained by the evidence.

Evidence held to sustain findings of fact.

Appeal by plaintiffs, Fred Rogers and Louisa H. Stickney, from a judgment of the District Court of Hennepin County, *Henry G. Hicks, J.*, entered October 5, 1893, that they take nothing by their action.

On May 18, 1885, Louisa H. Stickney and W. S. Porter leased to Bernhard A. Kruse and L. G. Eichelzer the brick store and basement No. 248 Nicollet Avenue, Minneapolis, for three years at a rent of \$175 a month in advance for the first year and \$250 a month for the other two years. They continued to occupy and to pay rent at the last named rate for some time, when Eichelzer sold and assigned his interest to Kruse who continued in possession until he made a general assignment for the benefit of his creditors. His assignee sold the stock of goods on March 26, 1890, to the defendant, Jonas F. Brown, and on that day assigned all his rights to the occupancy of the premises and delivered possession to him. He entered and occupied thereafter as tenant from month to month with the owners' consent and paid the rent to December 1, 1891. Porter sold and conveyed his half interest in the store June 22, 1891, to Fred Rogers. Defendant gave plaintiffs written notice

October 30, 1891, that he should deliver to them possession and cease to occupy the premises on November 30, 1891. He went out of possession on the day named. The premises remained vacant for over four months thereafter and plaintiffs brought this action to recover of defendant rent at said rate for the time the premises were unoccupied. A jury was waived, the court made findings and ordered judgment for defendant. It was entered and plaintiffs appeal.

B. W. Smith and C. H. Rossman, for appellants.

George R. Robinson, for respondent.

GILFILLAN, C. J. If the findings of fact—that the parties made an agreement renting the premises from month to month, and that they were occupied under that agreement from May 1st until November 30th, and that the monthly rent for that period was paid, and that the notice set out in the record was served—are supported by the evidence, the plaintiffs had no cause of action.

As to the agreement, the evidence was not very abundant; but we think, taken in connection with the circumstances known to both the parties, a finding either way would have to be sustained. The term of Kruse, when he made an assignment, was that of tenant from year to year. The assignee seems to have accepted the assignment of the lease; and, when defendant went into possession of the premises by his authority, he would probably be held, as matter of law, to be in as successor of Kruse. But though both parties knew how much the rent was, and that it was payable on the 1st day of each month, in advance, defendants did not know, as a fact, what Kruse's or the assignee's tenure was, and the lessors did not know how he was in possession. To make certain who was responsible for the rent, the lessors had an interview with defendant. According to his version of what passed,—and it was for the trial court to determine whether it was true,—they asked if he would sign a lease, and he told them "No;" that he would pay rent as long as he occupied, and no longer, and they could have the premises when they wanted them,—to which they said "Well," and left.

The trial court might from this understand that there was an assent to defendant's proposition. If assented to, it created a tenancy at will; and the previous rent being \$250 per month, payable

on the 1st day of each month, in advance, and no change in these respects being suggested, the court might find that they were understood by the parties as continuing under the new arrangement, and as fixing the periods for the payment of rents, and for service of notice to terminate the tenancy under the statute. It is not denied that the rents were paid to and including the month of November. On the 31st of October, notice on behalf of defendant, of the termination of the tenancy on November 30th, was served on the lessors. Although plaintiffs make some question of it, there can be little doubt it was served by authority of defendant.

The findings of fact were sustained by the evidence.

Judgment affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 981.)

STATE OF MINNESOTA vs. JOHN VOLLANDER.

Submitted on briefs May 1, 1894. Affirmed May 8, 1894.

No. 5718.

Spouse a competent witness against an adulterer.

Upon a charge of adultery, the testimony of the injured husband or wife is competent to prove the offense.

The defendant, John Vollerander, was indicted by the grand jury of Goodhue County, for the crime of adultery with Anna Lundberg the wife of Ole Lundberg. Being arraigned at October Term, 1893, he moved that the indictment be quashed on the ground that the husband, Ole Lundberg, gave evidence before the grand jury regarding the accusation and that the indictment was based thereon. The court, *W. C. Williston, J.*, denied the motion and on request of defendant reported the case so far as was necessary to present the question and certified the report to this court.

v.57M.—15

Frank M. Wilson, for the accused.

The indictment in this case should be quashed, because as the court finds, Ole Lundberg the husband was sworn and gave evidence before the grand jury, that he was married to said Anna Lundberg, and that the accused had made to him confessions of having had sexual intercourse with his wife.

When it is shown that the indictment was founded upon incompetent evidence a motion to quash is proper.

The question, whether the testimony of a husband which may tend to criminate his wife is admissible in a collateral proceeding is conceded to be unsettled, yet we claim the weight of authority sustains the position that the husband of the adulteress is not a competent witness before the grand jury. *State v. Gardner*, 1 Root, 485; *State v. Welch*, 26 Me. 30; *Commonwealth v. Sparks*, 7 Allen, 534; *Commonwealth v. Flohr*, 3 Crim. Law Magazine, 842; *Commonwealth v. Gordon*, 2 Brews. 569; *Commonwealth v. Shriver*, 1 Wharton Dig. (6th Ed.) 911; *Van Cort v. Van Cort*, 4 Edw. Ch. 621.

The better opinion is that on the trial of the paramour for adultery, the injured husband or wife is not a competent witness for the prosecution. Wharton Crim. Ev., § 390; Rice Crim. Ev., 285; 2 Heard Lead. Crim. Cas. 277; *State v. Wilson*, 31 N. J. Law, 77.

Samuel J. Nelson, County Attorney, for the State.

In *Rex v. Cliviger*, 2 T. R. 263, it was held that the evidence was not competent on the ground of public policy, but the case was afterward overruled by *Rex v. All Saints*, 6 M. & S. 194; *Rex v. Bathwick*, 2 B. & Ad. 639. In this country the evidence is held competent. *State v. Dudley*, 7 Wis. 664; *State v. Marvin*, 35 N. H. 22; 1 Greenleaf Ev., § 342; *United States v. Cutler*, 5 Utah, 608.

By Penal Code, § 262, the prosecution can only be commenced on the complaint of the husband or wife. If complaint be made by the injured one the danger of discord is not diminished by excluding the complainant from being a witness and the basis of the supposed public policy no longer remains.

GILFILLAN, C. J. Without deciding the question whether an indictment will be set aside on the ground merely that incompetent

evidence was received by the grand jury upon the charge on which it is found, we will decide the question presented by the briefs.

It is this: Upon a charge against the man alone, for adultery with a married woman, is the husband of the woman a competent witness to prove the crime?

The courts in several states hold him incompetent, none of them on the ground that any legal right or interest of the wife will be affected, but, where they state any reason for so deciding, upon the ground, apparently, of public policy, because to permit the testimony will create discord and dissension between the husband and wife. Other courts hold the testimony competent. In this state the matter of public policy is settled by the statute, which provides (Pen. Code, § 262) that "no prosecution for adultery shall be commenced except on the complaint of the husband or wife (save when insane)." If it be consistent with public policy that the injured party alone may institute the prosecution, it cannot be inconsistent with it that he or she may support it against the paramour by testifying to the facts within his or her knowledge; and it would be strange if the party may make complaint, but may not give evidence in support of it. Whether the evidence would be competent on a charge against the husband or wife need not be considered.

The decision of the court below is affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 878.)

PATRICK KENNEDY vs. CHICAGO, MILWAUKEE & ST. PAUL RY. CO.

Argued April 25, 1894. Affirmed May 8, 1894.

No. 8755.

Verdict sustained by the evidence.

Evidence *held* sufficient to sustain the verdict.

Assignments of error held not well taken.

Various assignments of error disposed of.

Measure of damages.

Damages *held* not so excessive as to require this court to interfere after the court below has scrutinized and cut down the verdict.

Appeal by defendant, Chicago, Milwaukee and St. Paul Railway Company, from an order of the District Court of Wabasha County, *Charles M. Start, J.*, made September 5, 1893, denying its motion for a new trial.

The plaintiff, Patrick Kennedy, was a laborer employed by defendant and on January 29, 1891, was assisting in repairing a pile bridge near La Moille. While attempting to spring the top of a pile into position the head of a jackscrew split, owing to a crack and allowed the pile to spring back and throw defendant off the bridge. He fell eight or ten feet to the ground and was seriously injured. He brought this action to recover damages claiming the defendant was negligent in furnishing a defective and unsafe jackscrew. After the evidence was in, defendant requested the court to charge the jury as follows:

If you find that in the operation of said jackscrew, plaintiff used a different lever than the one provided by the defendant's foreman, and that by reason thereof plaintiff was enabled to and did exert a greater pressure thereon than with the lever provided, and that such increased pressure was the proximate cause of the kicking of said screw at the time and place in question, then your verdict must be for the defendant.

The court refused and it excepted. This is appellant's sixth assignment of error. Plaintiff had a verdict for \$5,000. Defendant moved for a new trial. The court ordered that a new trial be granted unless plaintiff consent within ten days to reduce the recovery to \$4,000, and that it be denied if he do. He consented. Defendant appeals from the order. The discussion here was principally upon the question whether the damages are warranted by the evidence.

William Gale and M. B. Webber, for appellant.

Wilson & Bowers, for respondent.

GILFILLAN, C. J. So far as defendant's negligence is concerned, the jury might, from the evidence, find that the injury to plaintiff was due to the break in the jackscrew; that the break had begun before the jackscrew was given plaintiff to use; that the defect would have been discovered upon reasonable inspection; and that no such

inspection was made. From those facts they might find negligence on the part of the defendant.

On the point of plaintiff's contributory negligence, the only thing claimed to show that is, that having been provided with a lever about three feet long to turn the jackscrew, he, after a while, laid that aside, and took one six feet long, capable of bringing much greater power to bear on the jackscrew, and was using that when the break occurred. When the end which he and his co-workers were set to accomplish, and that he did not know of the defect in the screw, are taken into account, the most that can be said is that there was a case to go to the jury on the question of his negligence. That was not a question of law, and defendant's request specified in the sixth assignment of error was bad because it assumed that it was.

The charge of the court, taken together, was a fair, clear, and correct statement of the law of the case. The exceptions to it are not well founded.

Of the other assignments of error, there is nothing in any of them, and they need not be particularly mentioned, except that relating to the amount of the verdict. The verdict (\$5,000) certainly seems large. It seems large even as reduced (to \$4,000) by the court below. Judging it from the printed record alone, we would have been better satisfied with it had it been much less, or had the court made a larger reduction. From the evidence the jury might find that plaintiff's hearing, as to one ear, was destroyed, his sight impaired, his memory made unreliable, and his general health and strength much broken, so that he is unable to work so effectively as he could before the injury; and that these effects are permanent. In view of this state of the case, and of the fact that the court below evidently carefully scrutinized the verdict, and cut it down as much, presumably, as it thought it ought to do, we do not think the case is one for the interference of an appellate court.

Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 878.)

E. W. SHIRK vs. JOHN H. HOFFMAN et al.

Submitted on briefs May 1, 1894. Reversed May 8, 1894.

No. 8656.

Notice to end a tenancy from month to month.

When a tenant of real estate rented to him for one month holds over, and pays rent after the expiration of that month, without any new agreement, he becomes a tenant from month to month, and he can terminate the tenancy only by giving the notice required by 1878, G. S. ch. 75, § 40.

Appeal by plaintiff, E. W. Shirk, from a judgment of the Municipal Court of the City of St. Paul, *H. W. Cory, J.*, entered November 20, 1893.

Plaintiff owns No. 473 Rosabel Street in St. Paul and on December 1, 1890, leased it to defendants, John H. Hoffman and Frank Hoffman, for one month from that date at the monthly rental of \$12 payable in advance. They entered and continued in possession and paid the rent monthly to February 1, 1892, and then without giving any notice vacated the premises and refused to pay rent thereafter. Plaintiff brought this action to recover ten months rent to December 1, 1892. On the trial before the court without a jury these facts appeared and the court made findings and ordered judgment for plaintiff for two months rent \$24 and costs. It was entered and plaintiff appeals claiming that on the facts found he is entitled to judgment for \$120 with interest and costs.

Warner, Richardson & Lawrence, for appellant, cited *Finch v. Moore*, 50 Minn. 116; *Grace v. Michaud*, 50 Minn. 139.

C. D. & Thos. D. O'Brien, for respondent, cited *Smith v. Bell*, 44 Minn. 524; *Gardner v. Commissioners of Dakota Co.*, 21 Minn. 33.

GILFILLAN, C. J. At the common law, when a tenant for a fixed term, as for a year, held over after the expiration of his term, paying rent, he was strictly a tenant at will, but as tenancies at will, from their uncertain nature, were not favored, there gradually grew up the requirement that, to terminate the tenancy, notice must be

given of an intention to terminate at the end of the current period. So that, where the original term was one year, the tenancy, upon the holding over and payment and receipt of rent, became in effect one, not at will strictly, nor for a fixed term, but from year to year. So where the original term was for a stated less period than a year, as for one month, the tenancy became, upon holding over and payment of rent, a tenancy from month to month, with the right of reasonable notice of intention to terminate. The statute (1878, G. S. ch. 75, § 40) fixes what in such cases shall be reasonable notice. Neither party can, without the consent of the other, terminate the tenancy except by such notice. *Eastman v. Vetter*, ante, p. 164, (58 N. W. 989.) Judgment reversed, and the court below will enter judgment on the findings of fact in favor of the plaintiff for the amount claimed in the complaint.

Judgment reversed.

Buck, J., absent, sick, took no part.

(Opinion published 58 N. W. 990.)

LEVI J. HILL vs. DULUTH CITY.

Argued April 30, 1894. Affirmed May 8, 1894.

No. 8415.

Contract construed.

A certain contract construed.

Practical construction by the parties.

The doctrine of practical construction by the parties applied.

Verdict sustained by the evidence.

Evidence held to sustain the verdict.

Appeal by defendant, the City of Duluth, from an order of the District Court of St. Louis County, *Charles L. Lewis, J.*, made June 10, 1893, denying its motion for a new trial.

Lakeside was a city, adjoining Duluth, until December 31, 1892, when it was included within the boundaries of, and its liabilities

assumed by, the latter city. Sp. Laws 1891, ch. 57, p. 645. On July 11, 1892, Lakeside made a contract with the plaintiff, Levi J. Hill, for the grading and otherwise improving of Grand avenue in that city. He did the work and claimed therefor \$18,767.18. The city paid him all but \$700 thereof and he brought this action against the City of Duluth, its successor, to recover this balance and \$150 for some extra work specified. Defendant answered that by the contract he was to furnish sewer pipe for culverts and complete the work by October 20, 1893, and was to allow \$25 damages for each day after that date until the work should be completed; that he did not in fact furnish the pipe or complete the work until November 28, 1893, and it claimed damages therefor exceeding in amount the plaintiff's demands. Plaintiff replied that the city of Lakeside was to furnish the pipe, that it neglected to furnish it in proper time and that the work was delayed solely on that account. On the trial the jury found for the plaintiff and assessed his damages at \$719.30. Defendant moved for a new trial. Being denied it appeals. The discussion here was on the correct interpretation of the contract and specifications. They were long and verbose covering sixteen pages of the printed return.

H. F. Greene and A. H. Crassweller, for appellant.

John C. Hollembach, for respondent.

GILFILLAN, C. J. Action on a contract of plaintiff with the city of Lakeside (since consolidated with the city of Duluth) "for the grading and otherwise improving" an avenue in said city. The only controversy arises on a counterclaim of defendant for a failure to complete the work by the time specified in the contract. The contract stipulates, as damages, \$25 for each and every day the contractor shall be in default in completing the work. The fact that it was not completed by the time specified is admitted, but plaintiff claims the failure was caused by the neglect to furnish certain culvert pipe which, as he construes the contract, it was the duty of the city to furnish. In the contract is this clause: "And the party of the second part (the contractor) hereby agrees to receive the following prices for furnishing all the materials not found in the work (except such materials as shall be furnished by the city of Lakeside, as stated in this contract), and for labor, and for use

of tools and other implements necessary for executing the work contemplated in this contract." In the same paragraph follows a table or list of items of the kinds of work to be done, with the prices to be paid for each.

It is evident from the above quotation that some of the material was to be furnished by the city; and there is nothing in the contract to point out what material it is to furnish, unless it is to be found in the table or list of items. In that table are fifteen items, each (excepting two) so worded as to indicate that the contractor is to furnish the material and do the work. Those two are stated thus: "Laying 15 culvert pipe, lin. ft. .12" "Laying 24 culvert pipe, lin. ft. .25" Taking the fact that the specification of each other item includes the material and work, while the specification as to those two items seems limited to doing the work, to wit, "laying" the pipe, it is very suggestive that the pipe is the material which the city is to furnish. To state it most favorably to the city, it makes a case of ambiguity such as to let in the doctrine of practical construction by the parties. It was so practically construed; the city furnishing the pipe, and its engineer, knowing that fact, furnishing an estimate certifying that the contractor had completed his contract, and allowing him, for laying the pipe, the prices set down in the list.

There can be no question of the engineer's authority to construe the contract. It requires of him many things which he could only do by construing it. The engineer's estimate was also approved by the council. The facts showing the practical construction were undisputed, so that the admission of oral evidence of a prior agreement consistent with that construction, if erroneous, could not prejudice.

The stipulation for damages for delay could not be applied to a delay caused by the city itself. To so apply it would enable the city to profit, at the rate of \$25 per day, from its own wrong.

The same may be said of the clause in the contract requiring the contractor, if he desired an extension of time to complete his contract, by reason of "any hindrance or delay from any cause whatever," to give notice of the cause of detention to the engineer, to be reported to the council, it to "determine the amount of time that may compensate for the detention." The phrase "from any cause

whatever" must be held to refer to any other cause than the act of the city. Otherwise it might cause the contractor such delay that he could not complete his contract within, say, thirty days after the time specified, and then allow him but five or ten days on account of it. To make such a result possible would require stronger and more explicit terms than are in this contract.

From the evidence, the jury might find the cause of failure to complete the contract by the stipulated time was the delay of the city in furnishing the culvert pipe.

Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 58 N. W. 992.)

FELIX AMORT vs. HANS CHRISTOFFERSON.

Submitted on briefs April 12, 1894. Affirmed May 11, 1894.

No. 8935.

Verdict justified by the evidence.

Held, that the verdict in this case was justified by the evidence.

Appeal by defendant, Hans Christofferson, from an order of the District Court of Marshall County, *Frank Ives, J.*, made January 29, 1894, denying his motion for a new trial.

On April 27, 1891, the plaintiff, Felix Amort, sold and delivered to Tom Kieley one hundred and fifty bushels of seed wheat at \$1.10 per bushel and took his note for the amount \$165 due October 1, 1891, bearing ten per cent interest until paid. The note also recited that it was given for seed wheat to be sown on southwest quarter of Section two (2), T. 157, R. 50, in the Town of Big Woods, Marshall County, and in other respects complied with the lien law, (1878 G. S. ch. 39, § 21.) After Kieley applied but before selling the wheat plaintiff saw Christofferson, who had a mortgage on the crop to be raised, and asked him if he would pay for the wheat that Kieley wanted. Defendant answered, "Yes, you let Kieley have the wheat and I will see you paid for it" and told him to take a

seed grain note. Thereupon plaintiff delivered the wheat and took the note. Plaintiff was not paid and he brought this action against Christofferson alleging that he sold the wheat to defendant and at his request delivered it to Kieley and asked judgment for \$165 and seven per cent interest. The answer was a general denial. The issues were tried November 22, 1893; the jury found for plaintiff and assessed his damages at \$207 having evidently computed the interest at ten instead of seven per cent per annum. Defendant moved for a new trial, but was refused and he appeals.

Brown & Bayrell, for appellant.

Brown & Carr, for respondent.

COLLINS, J. While we are obliged to concede that, on the evidence, this was a very close case, we are of the opinion that the verdict cannot be disturbed. Defendant held a mortgage upon a crop yet to be grown, in the season of 1891, by one Kieley, and from the testimony it seems that he, as well as the plaintiff, who knew of the mortgage, supposed it would be a first lien, and would have priority over a seed-grain note given, under the statute, for the seed from which the crop was to be raised. Kieley applied to plaintiff for seed, but the latter refused to give him credit, and thereupon, according to the testimony, defendant told plaintiff to let Kieley have the seed, and "I will see you paid for it." This assurance, construed with reference to the connection in which the words were used, and the facts surrounding their utterance, cannot be distinguished from that considered in *Grant v. Wolf*, 34 Minn. 32, (24 N. W. 289;) and the words are fairly susceptible of the construction that the responsibility assumed by defendant was original, and not collateral to the agreement of another; hence not within the statute of frauds.

The words, "I will see you paid" for the seed grain, amounted, under the circumstances, to an agreement by defendant to pay for it himself.

It was shown that, when the plaintiff delivered the grain to Kieley, he took a seed-grain note from him for the amount of the purchase price, and from this it might be argued that defendant's promise was unquestionably collateral. But the plaintiff testified (and the jury had the right to believe him) that defendant told

him, when becoming responsible for the grain, that he must take a seed-grain note from Kieley, and, further, that he (defendant) would also sign it. The note was taken, and afterwards presented to defendant for his signature, which was refused. The explanation offered by plaintiff as to the taking of the note is such that it cannot be said to have been conclusively shown that any credit was given to Kieley. See *Cole v. Hutchinson*, 34 Minn. 410, (26 N. W. 319.)

We do not attach the importance to the complaint in a former action between these same parties, which was introduced in evidence by defendant, that is given to it by counsel for the latter. Plaintiff testified, without contradiction, that he did not know what it contained, and from its allegations it is evident that he was then endeavoring to collect his money from defendant, as he is in the present action.

It is true that the verdict was for a slightly greater amount than was claimed in the complaint, but evidently this grew out of an error in the computation of interest. The court below would have corrected the error, no doubt, had attention been called to it, but we do not see that it was. It is now too late for this to be done.

Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 304.)

H. V. RUTHERFORD vs. CHICAGO, MILWAUKEE & ST. PAUL RY. CO.

Submitted on briefs April 30, 1894. Affirmed May 11, 1894.

No. 8902.

No negligence of defendant shown.

Held, in an action to recover damages for the killing of plaintiff's intestate by reason of alleged negligence of defendant corporation when operating one of its trains, that the trial court did not err in its order of dismissal, made when plaintiff rested.

Appeal by plaintiff, H. V. Rutherford, from an order of the District Court of Ramsey County, *Charles E. Otis, J.*, made May 1, 1893, denying his motion for a new trial.

On August 26, 1892, Charles Hanzel was at work as a common laborer for the defendant, Chicago Milwaukee and St. Paul Railway Company, cleaning out a trench and fitting it for the foundation of a stone wall on the south side of the double track near Lexington avenue bridge on the line of its road between Minneapolis and St. Paul. The ditch was ten or twelve feet distant from, and parallel to, the south track and on a curve in a deep cut. Hanzel had no occasion to go upon the track in his work. But he went upon the south track while a heavy freight train with two engines was going by to the west upon the north track. A passenger train going east on the south track struck him and caused his death almost instantly. The plaintiff was afterwards appointed administrator of his estate and brought this action under 1878 G. S. ch. 77, § 2, to recover \$5,000 for the exclusive benefit of his widow and next of kin. When the plaintiff's evidence had all been given the court dismissed the case saying:

The evidence shows that it was not necessary for Hanzel to go upon the track. In being upon or so near the track as to be injured he unnecessarily placed himself in a place of danger and was guilty of contributory negligence. If he went onto the track in the course of his work it was one of the risks that he assumed in the work which he had undertaken.

Plaintiff excepted, moved for a new trial and appeals from the order refusing it.

Howard L. Smith, for appellant.

The railroad company ran its passenger train at a rate of forty miles an hour on a down grade around a sharp curve through a deep cut past a point where a gang of its laborers were at work beside its roadbed. The approaching train could be seen only three seconds before it was upon them. A noisy freight train was passing the same point going in an opposite direction upon an adjoining track. An ordinance forbade the moving of the train faster than four miles an hour. No signal was given till the moment of death. This was negligence on its part. No rule of law or humanity can justify a different conclusion. The presumption is that deceased was exercising ordinary care and caution on his part and that he was not guilty of contributory negligence. *Lillstrom v. Northern P. R. Co.*, 53 Minn. 464; *Erickson v. St. Paul & D. R. Co.*, 41 Minn. 500; *Crowley v. Burlington C. R. & N. R. Co.*, 65 Ia. 658; *Goodfellow v. Boston H. & E. R. Co.*, 106 Mass. 461.

If the ordinance was not applicable it was still for the jury to say whether the defendant was negligent in running its trains in the manner shown. *Shaber v. St. Paul M. & M. Ry. Co.*, 28 Minn. 103; *Bengtson v. Chicago, St. P. M. & O. Ry. Co.*, 47 Minn. 486.

The question of contributory negligence and assumption of risk was for the jury. *Johnson v. St. Paul, M. & M. Ry. Co.*, 43 Minn. 53; *Monks v. St. Paul, M. & M. Ry. Co.*, 32 Minn. 208.

W. H. Norris and F. W. Root, for respondent.

Hanzel's contributory negligence was without the slightest cause, was palpable and gross. There was nothing to bring him out of the ditch and near enough to the track to be struck. His unexplained careless position of unnecessary danger should defeat this action. Hanzel had no business to be where he was struck, no reason to be there, no duty to perform there. *Cunningham v. Chicago, M. & St. P. R. Co.*, 17 Fed. Rep. 882; *Marty v. Chicago, St. P. M. & O. Ry. Co.*, 38 Minn. 108; *Larson v. St. Paul, M. & M. Ry. Co.*, 43 Minn. 423; *Heffinger v. Minneapolis L. & M. Ry. Co.*, 43 Minn. 503; *Bengtson v. Chicago, St. P., M. & O. Ry. Co.*, 47 Minn. 486.

COLLINS, J. This was an action to recover damages for the killing of plaintiff's intestate, Charles Hanzel, alleged to have been caused by defendant's negligence while operating trains. When plaintiff rested, the case was dismissed, and this appeal is from an order denying his motion for a new trial.

It appeared from the testimony that, for about one month prior to his decease, Hanzel had been in defendant's employ as a section hand, at work in the vicinity of the place where he was killed, on defendant's double-track road between St. Paul and Minneapolis. His work had been that of the ordinary section hand about the roadbed, and he therefore knew, or ought to have known, of the ordinary movements and operations of the trains. While the men were engaged upon the roadbed near or between the rails, the section foreman watched, and gave warning of the approach of trains, so that the men could step aside if necessary. Except as to this, the men had to look out for themselves, for it was not the custom to ring the bell or blow the whistle as trains approached them.

For the purpose of building a retaining wall in a ditch on the south side of the roadbed, stone had been hauled over the south track, and for quite a distance thrown off the cars, so that it practically covered the ground from a line about two feet from the south rail to the edge of the ditch eight or ten feet distant. The wall was to be built ten or twelve feet from the track, which was laid upon a sharp curve with a grade descending towards St. Paul. Masons were building the wall, and, the day before his death, Hanzel was taken from his usual work, and put to cleaning out the bottom of the ditch with a shovel, so that the bottom might be properly prepared for the wall. Occasionally he had to throw out stone which had fallen into the ditch. He also had to remove stones which lay in such close proximity to the edge of the ditch that, unless removed, they would fall into it as he worked. It was shown that, in order to do this, he sometimes had to get out on the edge of the ditch, but there was no testimony whatever tending to show that for this purpose it was necessary for him to go within five or six feet of the rails.

It was surmised by one of plaintiff's witnesses that Hanzel might have thrown stones over on the track, or so close thereto that he

had to go into a place of danger, where he might be struck by a passing train, in order to take them out of the way, but the witness never saw him do anything of the kind. Another of plaintiff's witnesses stated that, when Hanzel threw stones back from the edge of the ditch, they would sometimes roll up close to the rails, and he would have to move them back out of the way of trains, but to do this he was not obliged to go upon the track. In response to the question, "In doing, that would he have to go near enough to the track to be hit by a passing train?" this witness said, "If he would be careless enough, and stand right,—that is, bend one way or the other,—then it could be so that he could be struck by the train."

Reference has been made to the prevailing practice, while Hanzel had been at work about the tracks, as to approaching trains,—the foreman watching, and giving notice to the men. Whatever effect this might have had upon the case had the notice been omitted, and Hanzel been killed when at his ordinary work, we need not consider, for it was shown that the foreman was not with the men employed at the wall, and that no one watched or gave warning of the approach of trains. Evidently, men at work upon the wall were not where danger was to be apprehended; but, in any event, the absence of the foreman, and the fact that no one watched or warned the men, was sufficient notice that each was expected to look out for himself.

None of the witnesses saw the accident, and consequently no one could state how Hanzel came to his death. At the time, a freight train with two engines, making a great deal of noise, was on the north track going towards Minneapolis, while a passenger train, running very rapidly, was on the south track going towards St. Paul. The curve at the point was so sharp that, with the freight train on the north track, a person standing where Hanzel's body was found could not see the passenger until it was within 250 feet. Undoubtedly, Hanzel was struck by this train, and he was instantly killed.

After this statement of the controlling facts as they appeared in evidence, it seems quite unnecessary for us to discuss the ruling of the trial court at any great length. It was unquestionably correct.

The train in question was running at a very high rate of speed,—much faster than was permitted under the ordinance; but it was well established by the evidence that this was customary, and that the rate of speed was not unusual for passenger trains; and, as before stated, no warning of their approach was given from the locomotives. All this must have been known to Hanzel, who had worked in the vicinity of this point for defendant at least one month. Knowing that it was defendant's custom to run its passenger trains at the rate of speed at which this was running, he assumed the risk incident thereto, while in defendant's employment. If its modes of running its trains were such as subjected Hanzel to risk of injury, he took upon himself the risk by continuing at work with knowledge of the dangers; so that, if the work in and about the ditch took the deceased into a place of danger, it was incumbent upon him to be mindful of the danger, and exercise sufficient care to avoid injury from passing trains. But there was nothing in the evidence which would have warranted a finding that his work necessarily took him so near the track as to make it dangerous. He might, of course, throw the stones upon the rails; but there was no necessity for it, and, if he did so, it would seem to have been an extremely careless act. If they were small enough to be easily handled by him, a removal of a few inches, only, was demanded in order to get them out of his way, not a removal of five or six feet, or more. If, upon the other hand, they were heavy and unwieldy, it would seem that Hanzel must have put forth great exertion and unnecessary strength in order to get them to a dangerous part of the roadbed. Conceding even that defendant was negligent in running its trains, it is obvious that Hanzel was careless, and contributed to the result by his own inexcusable negligence. That it was not even necessary to put himself in the way of a train in order to remove stones which had been thrown near the rails seems to have been well established by the witness whose evidence we have quoted.

Counsel for plaintiff relies mainly upon the case of *Erickson v. St. Paul & Duluth R. Co.*, 41 Minn. 500, (43 N. W. 332.) The difference in the facts can be seen at a glance. That case might have been in point if Hanzel had been killed while at work upon the track, the uniform practice being for the foreman to watch and warn.

But he was not. He was killed while working elsewhere, away from the foreman, and where he knew that no one gave notice of approaching trains.

It may not be essential, but we take occasion to say that there was no evidence tending to show that defendant's servants operating the train knew that Hanzel was there, or in any place of danger. Evidently, he could not have been seen in time to stop, and thus avert the accident.

Order affirmed.

BUCK, J., because of illness, took no part.

(Opinion published 59 N. W. 302.)

PATRICK D. TWOHY *et al.* vs. J. R. McMURRAN.

Argued April 25, 1894. Reversed May 11, 1894.

No. 3649.

A guaranty construed and held not continuing.

Where, by the terms of a written guaranty, it appears that the parties look to a future course of dealing for an indefinite time, or a succession of credits to be given, it is to be deemed a continuing guaranty, but where no time is fixed upon, and nothing in the agreement indicates a continuance of the undertaking, the presumption is in favor of a limited liability as to time and credits.

Performance shown by the evidence.

The written guaranty involved in this case *held* to be noncontinuing, and also that its conditions have been complied with, and the guarantor exonerated from liability by payment of the amount named therein.

Appeal by defendant, J. R. McMurren, from an order of the District Court of Ramsey County, *J. J. Egan, J.*, made August 26, 1893, denying his motion for a new trial.

The plaintiffs, Patrick D. Twohy and Cornelius L. Twohy, were partners in business selling groceries at St. Paul. William H. Baker was about to open a restaurant in the Colonnade building on St. Peter Street in that city. On May 4, 1889, defendant made and signed the guaranty set out in the opinion and it was delivered

to the plaintiffs. Between that date and June 14, 1889, they sold and delivered to Baker groceries exceeding in value \$250. On that day they presented to defendant a bill of the goods sold to Baker and asked for money. Defendant paid them \$250 thereon. The plaintiffs continued to sell Baker goods and he made payments. Their total sales to him to September 15, 1889, were \$996.21 and the payments including the \$250 paid by defendant amounted to \$688.14, leaving a balance of \$308.07 unpaid. They brought this action to recover \$250 of this balance from the defendant, claiming the instrument signed by him was a continuing guaranty and that he was liable to them for this amount notwithstanding his former payment. At the trial the court so held and directed the jury to return a verdict for the plaintiffs for that amount. Defendant excepted, moved for a new trial, and being denied appeals.

Lewis E. Jones and Jones & McMurran, for appellant.

John W. Pinch, for respondent.

COLLINS, J. This appeal is disposed of by going directly to the question of defendant's liability, as shown by the evidence, when, at the close of the case, the court directed a verdict for plaintiffs. The latter were in the grocery business at the city of St. Paul, and defendant was the president of a corporation which owned a large building in the same place. One Baker was about to open a cafe in said building, and, wishing to buy goods for use in the cafe, applied to plaintiffs for credit. It was refused unless payment was guarantied by a responsible party. Being advised of this, and at Baker's solicitation, defendant executed and handed to the latter a writing, as follows:

"Messrs. Twohy Brothers, Broadway, City—

"Gentlemen: If you desire to give Mr. William H. Baker a credit of two hundred and fifty (\$250.00) dollars with your house for provisions for the restaurant in the Colonnade, corner 10th and St. Peter streets, I will be responsible for such amount. Yours, etc.,

"J. R. McMurran.

"St. Paul, 4—5—89."

This was delivered to plaintiffs by Baker, an account was opened with him, and within the next six months goods were sold on credit

of the value of about \$1,000. Including a certain payment of \$250, to be hereinafter referred to, there was paid on this account not far from \$725, so that, when the action was brought, the balance due plaintiffs exceeded \$250.

1. It is contended by plaintiffs' counsel that the guaranty was a continuing one, intended by the parties as a standing credit at all times, and to cover a number of transactions. It is not claimed that at any one time the defendant's liability exceeded the sum mentioned in the paper, but that he could be made to pay that sum an indefinite number of times. He could not exonerate himself from an obligation to pay \$250 simply by paying it once, but if, after payment, credit was again given Baker, a fresh liability upon the guaranty at once arose. The claim of counsel really amounts to this: that payment by defendant of the amount mentioned in the writing justified and warranted further credit, and in a like amount, to Baker, as fully as if defendant had executed and delivered another written guaranty. We are not prepared to say that the plaintiffs' counsel has not cited a few cases which, to some extent, support his contention, but the prevailing rule is well established and is well stated in 9 Am. & Eng. Enc. Law, p. 77, as follows: "When, by the terms of the guaranty, it appears that the parties look to a future course of dealing for an indefinite time, or a succession of credits to be given, it is to be deemed a continuing guaranty, but when no time is fixed upon, and nothing in the agreement indicates a continuance of the undertaking, the presumption is in favor of a limited liability as to time." Many cases are cited, illustrative of the rule. The elementary doctrine must also be kept in mind that the liability of a guarantor is not to be extended beyond the terms of his contract. We are unable to see how the language used in the writing indicates that the parties had in mind a future course of dealing for an indefinite time, or that there was to be a succession of credits. Nor is the language ambiguous, nor is there anything in the case tending to show that it was ever regarded as ambiguous by at least one of the parties. The fact that the guaranty itself was not taken up by defendant at the time he claims to have paid, in accordance with its terms, cannot be regarded as a practical construction of its language, or as an admission that it was continuing.

2. Some two months after the guaranty was delivered, plaintiffs, at the office of the corporation of which defendant was president, called for money upon Baker's account, presenting a bill for about \$300. They were paid, by check of the corporation, the sum of \$250, and seem to admit that this was a payment upon the guaranty, and to have been so considered by all parties. The evidence is so clear and undisputed upon this point that, under our construction of the guaranty itself, a verdict against the defendant has nothing to support it.

Order reversed.

BUCK, J., absent on account of sickness, took no part.

(Opinion published 59 N. W. 301.)

EDWARD YANISH *et al.* vs. JASPER B. TARBOX *et al.*

Argued April 16, 1894. Affirmed May 11, 1894.

No. 8543.

Findings supported by the evidence.

Held, that the findings of fact as to the location of the county road mentioned in the description in the deed involved herein, and as to the sites of the stakes which designated each end of the easterly boundary line of the conveyed tract of land, were supported by the evidence.

Rulings as to evidence.

Certain rulings of the trial court as to the admission of testimony disposed of.

Appeal by plaintiffs, Edward Yanish and Samuel G. Horsnell, from a judgment of the District Court of Ramsey County, *J. J. Egan, J.*, entered September 22, 1893. The facts in this case are fully stated in the report of a former appeal, 49 Minn. 268.

Walter L. Chapin, for appellants.

Chas. N. Bell and *George E. Budd*, for respondents.

COLLINS, J. The facts herein very fully appear in the opinion rendered upon a former appeal. 49 Minn. 268, (51 N. W. 1051.) A

second trial was then ordered, upon the ground that the evidence did not support the findings of fact in respect to the construction to be placed upon the description found in the deed of conveyance from Belland to Baker. A second trial having been had, the court made findings of the same purport as those considered upon the former appeal, placing upon the second call or course in the description in the deed the same construction. This appeal is from a judgment entered in accordance with the findings. Most of the assignments of error go to rulings of the court when receiving the testimony, and by others it is asserted, as it was before, that the findings of fact as to the location of the road mentioned in the deed, and as to the sites of the stakes which, according to the description, designated each end of the easterly boundary line of the tract of land, are not supported by the evidence.

After a careful examination of the record, we feel satisfied that the findings last referred to are not open to the charge that the evidence on which they were based was insufficient. The existence and location of the road were not established by the most convincing proofs, but both of these facts were shown quite as clearly, in the absence of all official record of the same, as ought to be expected, after so many years, during which the neighborhood had been transformed from wild and almost unoccupied acres to city lots and urban residence property, and after most of the persons then upon the scene of action, and with opportunities to see and know about the road, have departed this life. It would be of no value for us to point out with particularity wherein the proofs produced upon the second trial supplemented and added to those presented on the first, but evidently an earnest effort was made to cover all of the deficiencies referred to in the former opinion. We will content ourselves by saying that it was shown that one Woodbury had possession of a tract of land there under some sort of an arrangement with the owner, the senior Belland. Baker purchased from Woodbury, taking the deed in question from Belland. Baker testified that, when about to buy, he was shown at least one stake, said to mark a corner upon the easterly line, and he was shown that line. This stake was in or near a well-traveled track or road, and he was told by Woodbury that the land came to the road along that line. Although Baker could not, at the time of the

trial, locate this road or track on the face of the earth, other witnesses did, with considerable certainty, especially in front of an old house, still standing, in block 19, and referred to in the former opinion. Well-defined traces of this road easterly, and in close proximity to the old house, still remain. No attempt was made by the plaintiffs to show that there had ever been any other road in that vicinity, and it is certain that, if the road which defendants sought to and did locate was the one mentioned in the deed, it ran very closely to where they insist the line actually is. If the road testified to was the one mentioned in the deed, it could not have been where it was fixed by the second call or course in the description, for that would have thrown it about 100 feet westerly from, and in the rear of, the old house; and there is abundant proof still on the ground that it ran about 50 feet easterly, and in front, thereof. It is impossible to believe that, as written, the second call or course was intended to reach this road; but by changing the word "north" to "south" the road was reached, and the tract practically inclosed. But we need go no further into the evidence, for there are many things which lead us to say that the existence and location of the road about where the defendants claim it to have been at the time of the execution of the deed was established with reasonable certainty. The road itself having been located, it must prevail; and the second call or course, as given in the deed, must yield thereto, the result being as declared by the court below.

Recurring now to the alleged errors in the rulings of the court when receiving the testimony, it may be said that the larger number of the assignments of error need not be noticed at all, for they are without merit. No matter what answers were given to the questions objected to, the result could not have been affected thereby. And there were several questions asked, when the attention of the witnesses was called to the "atlas" or plat book, which were extremely and objectionably leading. But no objection to them was interposed on this ground, as there should have been. It is true that this atlas or plat book, made very recently, and on which the tract of land in dispute is delineated, as claimed by defendants, may have been very suggestive to the witnesses who used it, and their recollection as to the old road may have been stimulated by its use; but that did not go to the materiality or competency of the

testimony. It simply affected its weight. The counsel for appellants seems to think that the most noticeable of the erroneous rulings are those covered by his assignments numbered twenty and twenty one. Henry Belland, Jr., was being examined by counsel for respondents, and the atlas was being used. Calling attention to the manner in which this disputed tract of land was there outlined, the witness was asked if the plat substantially conformed to his recollection of the location of the land. Again, he was asked if the tract, as he remembered it on the face of the ground, cut off a part of block 20 in Oliver's addition. The objection to both of these questions was that they were incompetent, irrelevant, and immaterial. These questions were leading, and both called for an opinion, but neither were open to the objection urged. If the plat did conform to the witness' recollection of the location of the land, the answer was material. It was as if the witness himself had drawn a plat of the tract, as he remembered its figure. If the tract in dispute did cut off a portion of what is now block twenty, it tended to show that the easterly line was as defendants contend.

The judgment is affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 800.)

ST. PAUL AND MINNEAPOLIS TRUST CO. *vs.* GEORGE W. JENKS *et. al.*

Argued May 4, 1894. Affirmed May 11, 1894.

No. 3657.

A state bank cannot indirectly purchase its own stock.

Held, in an action brought upon a promissory note by an assignee, under the statute, of an insolvent state bank, that a general demurrer to the answer was properly sustained; it clearly appearing that the transaction between the bank and defendants, as set forth in the defensive allegations in the answer, was at best nothing more than an attempt to evade the provisions of Laws 1881, ch. 77, § 3.

Appeal by defendants, George W. Jenks and Addie G. Jenks, from an order of the District Court of Hennepin County, *Robert*

Jamison, J., made November 11, 1893, sustaining a demurrer to their answer.

The Farmers and Merchants Bank of Minneapolis being insolvent made an assignment June 20, 1893, of all its property to the plaintiff, St. Paul and Minneapolis Trust Company, under Laws 1881, ch. 148, as amended by Laws 1889, ch. 30, in trust for its creditors. Among the assets was a note for \$1,000 and interest made by the defendants and dated April 26, 1893, due sixty days thereafter. Plaintiff brought this action thereon to recover its contents. The defendants answered that they received no consideration for the note, that Robert T. Lang, cashier of the bank, acting in its behalf requested them to purchase some shares of its stock then being offered in the market in such a manner as to work an injury to the bank and proposed to furnish the money to pay for the stock and take defendants' note for the amount and hold it until the stock could be sold and the proceeds returned to the bank, that defendants to accommodate the bank and its cashier consented and gave the note and received title to the stock and left it with the bank to be sold. A purchaser was not found and the note was renewed from time to time until the bank assigned. To this answer the plaintiff demurred. The demurrer was sustained and defendants appeal.

Robb & Slack, for appellants.

Harry D. Stocker, for respondent.

COLLINS, J. Action upon a promissory note brought by an assignee in insolvency of a bank organized and incorporated under the laws of this state. The execution and delivery of the note was admitted in the answer. It was then alleged, by way of defense, that in the month of March, 1892, the defendant George W. Jenks was requested by Robert T. Lang, who was then the duly elected and qualified and acting cashier of said bank, on behalf of said bank, to purchase certain of its stock, which said Lang informed said defendant was being offered for sale on the market in such manner as to work an injury to said bank, said request being accompanied by the further proposition on the part of Lang that said bank would furnish the necessary money therefor, and take a note from said defendants, executed as set forth and described

in the complaint herein, and hold the same till such time as said stock could be sold, and the proceeds thereof returned to the bank; it being fully understood, by and between said defendant George W. Jenks and said Lang, that the same was wholly at the request of, and for the sole benefit of, said bank; it being further understood and agreed, by and between said Lang and said Jenks, that if said stock should not be so sold, and the proceeds applied, as afore-said, by the time said note became due, the same should be renewed from time to time till said stock should be so sold; but in no case was the note to become or be regarded an obligation or evidence of indebtedness in favor of said bank, and against said defendants.

Then followed allegations that defendant George W. did purchase the stock shares, procuring the needed money from the bank, and giving a note for \$1,000, signed by both defendants, as agreed upon; that the stock shares were still held by him; that the note was renewed from time to time; and that the note in suit was one of the renewals. It was also alleged that in this entire transaction the cashier was acting in behalf of the bank, and with the full knowledge, consent, and authority of its board of directors. The appeal is from an order sustaining a general demurrer to this answer.

Upon their argument, counsel for defendants took the position that from the facts it clearly appeared that there was a want of consideration for the making and delivery of the original note and all of its renewals by defendants, and that really they were nothing but accommodation makers. We do not feel called upon to examine and consider the answer with a view to determine just what the relations were between the bank and the makers of the note. Taking the view most favorable to the latter, it is evident that they were attempting to aid the bank in evading the statute under which it was incorporated, and doing that which is prohibited by law. A banking association is forbidden in this state to make any loan or discount on the security of the shares of its own capital stock, or to be the purchaser or holder of any of its shares of capital stock, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith. Laws 1881, ch. 77, § 3.

The bank itself could not have purchased the stock shares, nor could it enter into any agreement whereby Lang could purchase

and hold the shares for it or in its behalf. The answer discloses that the bank and the defendants were attempting to accomplish, by indirect means, that which could not be done directly, without violating the statute. As a defense, the allegations found in the answer were of no value.

Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 299.)

Application for reargument denied May 25, 1894.

B. WALTER JONES vs. DAVID M. SWAIN.

Submitted on brief by appellant. Argued by respondent April 18, 1894. Modified May 11, 1894.

Nos. 8899, 8900.

Practice, opening judgment and allowing answer after default.

In an action to recover unliquidated damages for breach of contract, wherein judgment had been ordered and entered for want of answer, the defendant, upon affidavits and a proposed answer, in which was a general denial, seasonably moved that the judgment be opened, and that he be allowed to defend on the merits. The court, although satisfied with the excuse for the default, refused to relieve defendant, for reasons which are stated in the opinion. *Held*, because of the peculiarly exceptional circumstances of the case, that the rule as to what is required by way of answer or defense on such motions laid down in *St. Paul & Duluth R. Co. v. Blackmar*, 44 Minn. 514, does not apply, and that for the sole purpose of allowing a reassessment of the damages sustained by plaintiff the order appealed from should be, and is, modified.

Appeal by defendant, David M. Swain, from an order of the district Court of Washington County, *W. C. Williston, J.*, made July 24, 1893, denying his application to vacate and set aside a judgment entered against him on default of answer.

Appeal also from the judgment entered against him May 26, 1892, for \$1,567.40 damages and costs.

On April 5, 1892, defendant agreed with B. Walter Jones and Harry S. De Puy of Missoula, Montana, to build and deliver free on board cars at Stillwater, Minn., within forty five days thereafter a steam engine, boiler and machinery for a sternwheel steamboat to ply on the Kootenai river, Mont., and they agreed to and did pay him \$2,200 therefor. He did not complete and deliver the machinery until June 18, 1892. De Puy assigned all his interest to his partner and Jones brought this action to recover damages for the delay, claiming \$50 a day for twenty nine days. The summons and complaint were served on April 1, 1893, by leaving a copy at defendant's house with his wife, he being absent. He did not answer and the testimony of plaintiff was taken on commission at Jennings, Mont., and on May 26, 1893, judgment was entered by order of the court against the defendant for the amount claimed with interest and costs.

The defendant moved the court July 11, 1893, on an affidavit of merits and affidavits excusing his default and an answer, to vacate the judgment and allow the answer to be filed and copy served. The answer among other things contained a general denial and alleged an agreement extending the time in which he was to complete and ship the engine, boiler and machinery and also denied that plaintiff had sustained any damages by the delay. The plaintiff opposed the motion on affidavits and produced defendant's letters showing there was no agreement for delay and the court denied the motion holding the answer to be sham. Defendant appeals from the order and also from the judgment.

J. N. Castle, for appellant, cited *Wright v. Jewell*, 33 Minn. 505; *City Bank v. Doll*, 33 Minn. 507.

F. W. Gail, for respondent, cited *Catlin v. Billings*, 13 How. Pr. 511; *Constantine v. Wells*, 83 Ill. 192.

COLLINS, J. There are two appeals in this case,—one from an order denying defendant's motion to vacate and set aside a default judgment against him and to allow him to interpose an answer, the other from the judgment itself. We need not refer particularly to the last-mentioned appeal, but shall confine our discussion to that from the order denying defendant's motion. The action was

brought in the county in this state in which defendant lived, and in which he manufactured the machinery in question, to recover damages said to have been sustained by plaintiff and another person, in partnership, by reason of the defendant's failure to furnish at the time agreed upon in a contract between the parties certain machinery—practically all of the machinery needed—for a steamboat then being built by the copartners on the Kootenai river in Montana. The agreed contract price was \$2,200. It was alleged in the complaint, that through the default of defendant there had been a delay of twenty nine days in shipping the machinery, and by reason thereof the copartners had been “deprived of the use” of said boat for that period of time; and that the reasonable worth and value of the use of the boat during said period of twenty nine days was \$50 per day, amounting in all to \$1,450. There was an allegation that the copartnership had been dissolved, and that plaintiff had thereupon acquired by assignment all of the interest of his former partner in and to the contract and the cause of action.

The defendant having failed to answer, plaintiff's testimony was taken by deposition, and his damages assessed by the court at the amount demanded in the complaint. Judgment was duly entered, and soon afterwards, upon an affidavit of merits and a proposed answer, the motion referred to was made, and, as before stated, denied. The court below held that the motion had been seasonably made, and that the defendant had fully excused his default and apparent neglect. Its refusal to grant the motion seems to have been placed exclusively on the ground that certain allegations of the answer not only failed to contain facts sufficient to constitute a defense, but that they were false and sham. We quite agree with the learned court in this. But, in addition to these allegations, the answer contained a general denial, and this put in issue the amount of damages sustained by reason of the delay. Had the defendant served his answer, containing, as this did, a general denial, within the period prescribed for answering, it would actually have presented an issue,—probably the most important one in the case, namely, in what amount was the copartnership damaged by reason of defendant's failure and neglect to ship the machinery as agreed upon in the contract? More than this, the defendant would have been permitted, under the statute, without answering

at all, to have had an assessment of the amount plaintiff was entitled to recover as damages.

We are unable to discover that the court below took into consideration the fact that there was a general denial in the proposed answer. To the contrary, it very clearly appears that it did not, but simply looked into the other allegations referred to, and became convinced as to their insufficiency, and also as to their sham character. The denial put in issue the amount of the damages sustained by the plaintiff and his partner by the loss of the use of the boat, and to this extent there was no claim, and no attempt to show that it was sham and false; and for this reason, taking into consideration the nature of the action and the circumstances of which we shall hereafter speak, we think the court below erred in not granting to defendant a part of the relief asked.

It is urged by respondent's counsel that the willful and false allegations in the answer, of which we have spoken, show entire bad faith on defendant's part, tainting the whole merits of his motion, and that a court is not required to set aside a default, even when the defendant has not been guilty of negligence, unless it is made to appear that he has a meritorious defense. And, further, that when applying to be relieved from his apparent laches, defendant should not have been content with a general denial, but in a more specific manner should have shown that the damages were not in so great an amount as claimed. In *St. Paul & Duluth R. Co. v. Blackmar*, 44 Minn. 514, (47 N. W. 172,) it was said that upon an application to set aside a judgment and for leave to answer, the court, even though satisfied with the excuse for the default, need not be content with a formal compliance in the answer with the rules of pleading which a party may follow when answering as a matter of right, but may require that in its denials it show the actual extent of the controversy upon the matters claimed, as where the denials are of amounts stated in the complaint, and the exact amounts stated are not material. We have no doubt of this, as a general rule, but in the case at bar it must be borne in mind that it was brought to recover unliquidated damages, said to have resulted from a breach of contract for the manufacture and delivery of machinery. The contract price was fixed at \$2,200. The delay

was for twenty nine days, and the damages claimed (and recoverable, if the judgment stands) \$1,450,—almost two-thirds of the contract price.

The defendant was a manufacturer at Stillwater, in this state, while the delay on which plaintiff bases his cause of action as to the amount of his loss was at a point 1,300 miles away from defendant's place of business and residence, in a country so new and undeveloped that there was no post office at the railway station to which the machinery was to be and was shipped. The facts as to the number of days and the amount of the loss sustained by this delay could not be obtained by defendant without investigation at a place remote from his residence, and because of this remoteness there would be apparently some delay and difficulty in ascertaining them. When this action was brought, and until after the entry of judgment, defendant was south, absent on business. On learning of the default, he had to move hastily, and it ought not, under all the circumstances, to be expected or required of him that he go into the details as to the manner and extent of plaintiff's damages, and to make an answer or an affidavit quite as circumstantial and specific as in an ordinary case. In view of the peculiarly exceptional features presented, we are of the opinion that the court below erred in refusing all relief to defendant.

His counsel urges in the appeal from the judgment that under the complaint plaintiff is attempting to recover anticipated profits. The complaint is not open to such an objection. The judgment may stand until superseded by one entered upon another assessment of damages. The default is opened, and the answer may be interposed for the sole purpose of allowing the damages sustained to be reassessed. To this extent the order appealed from is modified.

Buck, J., absent, sick, took no part herein.

(Opinion published 59 N. W. 297.)

WILLIAM S. WOODBRIDGE *vs.* DULUTH CITY *et al.*

Argued April 19, 1894. Affirmed May 11, 1894.

No. 8919.

Duluth charter construed.

Under the amendment (Sp. Laws 1891, ch. 55, § 35) to the charter of the city of Duluth (Sp. Laws 1887, ch. 2, subch. 9, § 9), "water and light bonds," may be issued by the authorities of said city, the requisite preliminaries having been duly observed, as a part of its general indebtedness, notwithstanding such bonded indebtedness already exceeds five per cent. of the assessed valuation of the taxable property in the city, according to the then last assessment.

Reasonable time a question of fact.

Whether "reasonable time" has elapsed, in any given case, may be a question of law; but, on the complaint here, it is one of fact, not to be disposed of on demurrer.

Appeal by plaintiff, William S. Woodbridge, from an order of the District Court of St. Louis County, *S. H. Moer, J.*, made March 26, 1894, sustaining a demurrer to his complaint.

Plaintiff is a resident, citizen and taxpayer of the City of Duluth and commenced this action March 16, 1894, against that city, the members of its common council and its other officers to restrain the issue and sale under Sp. Laws 1891, ch. 55, § 35, p. 638, of \$800,000 "Water and Light Bonds." The complaint stated that an election was held under the act on August 4, 1891, and a majority of the legal voters present and voting, voted to issue the bonds, that over two and a half years had since elapsed, that if the bonds were now issued and sold the total indebtedness of Duluth would exceed five per cent of the assessed value of the taxable property of the city. The defendants demurred to the complaint and the court sustained the demurrer. Plaintiff appeals.

S. T. & Wm. Harrison, for appellant.

The assessed value of the taxable property of Duluth according to the last assessment was \$43,875,582 and the total bonded indebtedness of the city, exclusive of the \$800,000 water and light bonds proposed to be issued, \$1,865,150.

If the water and light bonds are issued the total bonded indebtedness of the city will exceed five per cent of the assessed value of the taxable property, in the sum of \$471,370.

The vote was taken on August 4, 1891, authorizing the issuance of bonds, but nothing further was done until January 22, 1894, at which time the council passed an ordinance authorizing the sale of said bonds. It seems to us that the council could only act upon this matter within a reasonable time after the vote and that two years and five months is more than a reasonable time. For this reason the council has no authority to issue bonds.

Page Morris, for respondents.

COLLINS, J. By the charter of the city of Duluth (Sp. Laws 1887, ch. 2, subch. 9, § 9) the common council is authorized to pass an ordinance whereby there may be issued coupon bonds of said city, in the sum of \$100,000, for the permanent improvement fund, for the purchase or payment before or at maturity of valid outstanding bonds issued by the old city, and for the payment of any maturing bonds of the city or village, and other bonds for the benefit of the general fund in such amount as the council may deem advisable: provided that no bonds shall be issued, or be valid, if issued, which shall increase the bonded indebtedness on which the city is liable above five per cent. of the assessed valuation of taxable property in the city, according to the then last assessment. The manner in which these bonds are to be signed, countersigned, placed upon the market, and sold, is also regulated by the law. By Sp. Laws 1891, ch. 55, § 35, there were added to section 9, *supra*, by amendment, certain provisions for temporary loans by the council as occasion might require, to be evidenced by coupon notes, the amount of the sum to be taken and considered a part of the bonded indebtedness as affected and limited by the five per cent. proviso. Section 9 was further amended by adding a provision in the following language:

"Water and Light Bonds. The city of Duluth is hereby authorized to issue water and light bonds to such an extent as may be necessary for the purpose of erecting and maintaining suitable water and light plants, or for purchasing any water or light plant in operation in said city. Said bonds shall be issued, sold and evi-

v.57M.—17

denced in the same manner as the general bonds of the city except as hereinafter provided. They shall be a first lien upon all water and light appliances and structures of every kind erected, owned or purchased by said city, and the amount of indebtedness required in order to secure said water and light plants shall not be deemed to be a part of the general indebtedness of the city heretofore referred to as not to exceed five (5) per cent. of the assessed valuation of property within said city, but shall be held to be a special indebtedness, and shall be, as hereinbefore stated, a special and exclusive lien upon all water and light franchises purchased by said city in whole or in part by said funds."

Then followed provisions for the submission of a proposition to issue such bonds to the legal voters of the city, and, if a majority of the votes cast at the election were in favor of their issue, the proper officials were authorized to issue, negotiate, and sell the same as other city bonds were issued, negotiated, and sold. It was also provided that the council might, from time to time thereafter, submit the proposition of issuing other and additional water and light bonds to the voters, and further, that, if the revenues derived from water and light plants owned by the city exceeded the cost of operating and maintaining the same, not less than twenty five per cent. of the net revenue should be set aside by the city to create a sinking fund for the payment of the bonds as they matured.

The principal question discussed by counsel on the argument of this appeal is whether the charter, as amended in 1891, confers upon the council, a majority of the legal voters having duly voted in favor of the proposition to issue water and light bonds, the power to issue bonds, upon which the city is generally liable, at a time when, by such issuance, the bonded indebtedness of the city will exceed five per cent. of the assessed valuation of the taxable property in the city, according to the then last assessment; and, to determine this, we have to ascertain, if possible, the legislative intent, as expressed in the act of 1891, which, it will be observed, was a direct amendment to that section of the charter in which we find the five per cent. proviso. This fact may be kept in mind when construing the language. And the legislative purpose and the object aimed at are to be also kept in mind, and language susceptible of more than one construction is to receive that which will

bring it into harmony with such object and purpose, rather than that which will tend to defeat it.

It is contended by counsel for respondents that it was the purpose of the legislature, manifested by the wording of the law, to make the water and light bonds a special indebtedness, not enforceable against the city, as are other bonds, but solely and exclusively by resort to the water and light franchises, structures, and appliances. It seems to be claimed that, because these bonds were made a special and exclusive lien upon the water and light plant or plants, it inevitably follows, without regard to other language found in the law, that they cannot be a part of the general indebtedness of the city, or, if they are, that they fall within the inhibitory clause of the charter. It would be a forced and unnatural construction of the enactment, probably operating to wholly defeat its purpose, to hold that the holders of the bonds could only look to the franchises, structures, and appliances for payment. We are not inclined to presume that the legislature simply intended to confer upon the city the worthless privilege of putting bonds on the market, in the hope of their being purchased by capitalists who would be willing to advance money, that the city, without incurring any liability itself, might experiment in furnishing water and light to its citizens.

Not only this, but, if these bonds were not to be considered as a part of the general indebtedness of the city, all reference to the five per cent. clause was superfluous and unnecessary. There can be no doubt but that, while these bonds—undoubtedly for better security—are made a special and exclusive lien upon the plants, they are a part of the bonded indebtedness of the city, as much as any other bonds. This leads up to the important inquiry already stated, and we are of the opinion that there is no ambiguity or doubt about the legislative intent and purpose, as expressed in the amendment. It will be noticed—and we have already referred to this—that by the first paragraph of the amendment to section 9 the council was authorized to make temporary loans, issuing coupon notes therefor, and, that there might be no question as to these notes, it was expressly provided that the indebtedness incurred in this way should be taken and held as a part of the total indebtedness referred to in a preceding and prohibitory clause of the section. Then comes

that part of the amendment which covers and authorizes the issuance of the bonds in question, and again did the legislature express itself in plain language, by declaring that the bonds so issued should not be deemed a part of the general indebtedness already referred to as not to exceed five per cent. of the assessed valuation. Putting the language in a different form, it is that in estimating the bonded indebtedness of the city, for the purpose of ascertaining whether the limit had been reached, the water and light bonds should not be taken into consideration. No other effect can be given the language, and if it does not mean this it means nothing at all. The entire structure of the amendment indicates, unmistakably, that it was well appreciated by the legislature that water and light bonds which would serve the purposes of the city, and enable it to buy or build the necessary equipment, would have to be issued in a large amount, far exceeding that already authorized. The office of the amendatory legislation was to empower the city to proceed without limitation or restriction as to the amount in the issuance of bonds for the particularly specified object.

It is urged that more than a reasonable time elapsed after the bonds were voted before the council passed the ordinance under which they must be issued. That question cannot, under the circumstances appearing in the complaint, be regarded as one of law, to be disposed of on demurrer. Whether reasonable time has elapsed in any given case may be one of law, but here it seems to be one of fact.

This disposes of all questions argued by appellant, and the order is affirmed.

BUCK, J., absent on account of sickness, took no part.

(Opinion published 59 N. W. 296.)

STATE OF MINNESOTA *ex rel.* H. W. CHILDS, Attorney General, *vs.*
CHARLES H. DART.

Argued April 24, 1894. Decided May 14, 1894.

No. 8621.

Resignation, appointment and eligibility of county treasurer.

During the pendency of proceedings under Laws 1881, ch. 108, for the removal of a county treasurer from his office, and suspending him from that office: *Held*: (1) He may resign or relinquish his office; (2) but that he is not eligible for reappointment to the same office for the remainder of the same term by the county commissioners until he has been acquitted, or the proceedings dismissed; (3) that his eligibility for the office during the remainder of the term is also involved in the removal proceedings which may be prosecuted for the purpose of determining that eligibility after he has thus resigned or relinquished his office.

Information filed in this court December 14, 1893, by Henry W. Childs, Attorney General, praying that a writ issue to Charles H. Dart, commanding him to appear and show *quo warranto* he holds the office of County Treasurer of Meeker County. The information stated that the respondent Dart was elected treasurer of that county for the term commencing January 2, 1893, that he accepted the office and that the Public Examiner on September 27, 1893, made report to the Governor that Dart had received in June and July, 1893, checks from divers persons named, in payment of money due to him as such treasurer and had loaned to divers other persons considerable sums of money from the treasury and received checks therefor, and that he held the checks without presenting them for payment and treated them as money until September 27, 1893. It further stated that the Governor thereupon suspended Dart from his office by an order made October 3, 1893, and gave notice thereof to the county auditor who convened the board of county commissioners and they appointed Dart treasurer *ad interim* (Laws 1881, ch. 108), that he accepted, and on October 11, 1893, resigned the office of treasurer and was on the following day appointed by the board treasurer to fill the vacancy and that he now claims to be such officer.

The writ was issued returnable January 4, 1894, and Dart made answer substantially admitting the statements in the relation and claiming to hold the office by virtue of his appointment of October 12, 1893, under 1878 G. S. ch. 8, § 147. He denied any intention to do any unlawful act and alleged that all checks had been paid and no loss incurred. A reply was filed and a stipulation made as to certain facts and the questions submitted for determination.

H. W. Childs, Attorney General, and *George B. Edgerton*, his assistant, for relator.

Spooner & Taylor, for respondent.

CANTY, J. This is a writ of *quo warranto* brought to try the right of the respondent to the office of county treasurer in Meeker county. He was elected to that office at the general election in November, 1892, for the term of two years, commencing January 2, 1893.

On the 27th day of September, 1893, the public examiner filed with the governor a report, under Laws 1881, ch. 108, charging respondent with malfeasance in office in this: That he received in June and July checks of divers persons for taxes and state land sold, and held them as public moneys, and so retained them until said 27th of September, and failed to present any of them for payment; and, also, that he loaned the public funds to private parties, in all amounting to the sum of \$2,209.96.

On October 3, 1893, upon the filing of this report, the governor suspended respondent from his said office. On October 6th the board of county commissioners met, and by unanimous vote elected respondent county treasurer *ad interim* during his suspension.

On October 11th he resigned his office as county treasurer. In the mean time the governor had appointed a special commissioner to take and report the testimony for and against respondent, and the time for taking the same was set for October 12th, and notice given to him. He appeared specially, and objected to the jurisdiction of the commissioner, on the ground that he had ceased, on account of his resignation, to be treasurer. Afterwards, on the same day, the board of county commissioners elected him as county treasurer to fill the vacancy caused by his resignation. After-

wards the commissioner reported the testimony taken, and the governor fixed October 31st as the time of hearing, and notified respondent, and thereafter, on November 16th, made and filed an order removing respondent from the office of treasurer of said county.

The questions presented on this hearing are:

(1) Had the respondent a right to resign his office during the pendency of the proceedings for removal, and while under suspension?

(2) If so, was he eligible for reappointment by the board of county commissioners?

It seems to us he had a right to resign or relinquish his office—call it which name you will—during the pendency of the proceedings.

But we are of the opinion that he was not eligible for reappointment while under suspension, or during the pendency of the proceedings. The removal proceedings cannot be nullified or reversed in that manner. Such removal proceedings are not merely for the purpose of ousting the person holding the office; they include a charge that he has forfeited his qualification for the office for the remainder of the term. They are brought to declare a forfeiture of a civil right, his eligibility, his qualification to hold that office for the rest of that term. The proceeding is not brought for his removal from a day or a week or a month of his term, but from the whole of the remainder of his term, and the final order of removal is not made for his removal from a day or a week or a month of his term, but from the whole of the remainder of his term. Nothing less is involved in the proceedings. Whether the voters at the polls could condone the offense by which he forfeited his office it is not necessary here to decide. We are of the opinion that the county commissioners could not do so.

The fact that respondent may have had no intention to defraud the county, and that his acts were mere irregularities, which resulted in no loss to the county, were matters exclusively for the governor to consider. He was an independent tribunal. *State v. Peterson*, 50 Minn. 239, (52 N. W. 655.) And, as long as he kept within his jurisdiction, we cannot in this proceeding review the

questions of fact tried by him, or determine how much or how little moral turpitude there was in these irregularities.

It is ordered that relator have judgment of ouster against respondent.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 190.)

LEONARD W. FRENCH *vs.* JACOB GINSBURG *et al.*

Submitted on briefs May 1, 1894. Affirmed May 14, 1894.

No. 8618.

Judgment in replevin, form of.

In an action of replevin, where the property has been delivered to the plaintiff before trial under proceedings in the action, and on the trial the jury find for the defendant, and find the value of the property, *held*, that the defendant is not entitled to elect to take judgment for the value only, and not, in the alternative, for the return of the property or for the value in case a return cannot be had.

Appeal by Jacob Ginsburg, one of the defendants, from a judgment of the District Court of Ramsey County, *John W. Willis, J.*, entered November 10, 1893.

The plaintiff, Leonard W. French, was on January 31, 1893, appointed receiver of the property of Samuel Rosenbaum, under Laws 1881, ch. 148, § 2, as amended by Laws 1889, ch. 30. He as such brought this action March 6, 1893, against defendants, Jacob Ginsburg and Samuel Rosenbaum, to recover possession of a stock of ready made clothing and men's shoes, or the value thereof in case possession could not be obtained, together with damages for the detention. The sheriff took the property and delivered it to the plaintiff who retained it pending the litigation. Ginsburg alone answered and on the trial May 29, 1893, the jury found for him and assessed the value of the goods at \$350 and his damages for the taking and detention at \$75.

Ginsburg then moved the court for an order that judgment be entered in his favor for the value of the goods as assessed by the jury and the damages and that it be not entered in the alternative, for a return of the property, or if such return could not be had then for the value. The court denied the motion and judgment was entered in the alternative allowing plaintiff to return the goods. Ginsburg appeals claiming the plaintiff should not have the privilege of returning the property.

C. D. & Thos. D. O'Brien, for appellant.

In actions in claim and delivery where a verdict is rendered in favor of a defendant and he, such defendant, does not demand a return of the property he has the right to elect whether to take a judgment in the alternative form or a money judgment for the value of the property as found by the jury. This is the rule which obtains in this state, in Wisconsin, Illinois, Arkansas, Michigan and Tennessee; and is the general rule applicable to cases of this kind. *Wells Replevin*, § 774; *Stevens v. McMillin*, 37 Minn. 509; *Thompson v. Scheid*, 39 Minn. 102; *Pratt v. Donovan*, 10 Wis. 378; *Morrison v. Austin*, 14 Wis. 601; *Farmers' L. & T. Co. v. Commercial Bank*, 15 Wis. 424; *Smith v. Coolbaugh*, 19 Wis. 106; *Johnson v. Dick*, 69 Mich. 106.

Munn, Boyesen & Thygeson, for respondent.

The Wisconsin cases do not apply. They are based upon the Wisconsin statute which is very different from that of this state. Here the defendant must take back the property if it can be obtained. *Sherman v. Clarke*, 24 Minn. 37; *Berthold v. Fox*, 21 Minn. 51; *Kates v. Thomas*, 14 Minn. 460; *Dwight v. Enos*, 9 N. Y. 470; *Glann v. Younglove*, 27 Barb. 480; *Fitzhugh v. Wiman*, 9 N. Y. 558; *Wood v. Orser*, 25 N. Y. 348; *Seaman v. Luce*, 23 Barb. 240; *Hall v. Jenness*, 6 Kans. 356.

CANTY, J. The plaintiff brought an action of replevin, and took possession of the property under the provisional remedy. The defendant Ginsburg alone answered, denying plaintiff's ownership and right to possession, alleging ownership in himself, and alleg-

ing that plaintiff wrongfully took the property from him, and demanded judgment for damage for such taking, and for the value of the property.

On the trial, defendant had a verdict, the value of the property was found to be \$350, interest \$5.71, and damages \$75. Thereupon defendant made before the court a motion for judgment, in which he stated that he elected to take a money judgment only, and not an alternative judgment for the return of the property or for the value thereof, found by the jury, in case a return cannot be had. The court below denied his motion, ordered judgment in the alternative form, and from the judgment so entered defendant appeals.

We are of the opinion that defendant's motion was rightfully denied, and that the judgment should be in the alternative. In *Sherman v. Clark*, 24 Minn. 43, where the referee found as a fact that the defendant had disposed of the property, and a recovery of it could not be had, and for that reason ordered a judgment for plaintiff for the value only, this court held that a judgment should have been ordered in the alternative, although the plaintiff appeared to be satisfied with the order as it stood.

Our statute puts the plaintiff and defendant on an equal footing in this respect, and provides for an alternative judgment for the one as well as the other, and there is no provision, as there are in the statutes of some states, allowing the party entitled to judgment to elect whether or not he will take it in the alternative. Neither is the taking of the property under the proceedings in the action at the commencement of the suit such a taking as amounts to a conversion.

Judgment affirmed.

(Opinion published 59 N. W. 189.)

PETER WOLFORD vs. TIMOTHY A. BOWEN et al.

Argued May 8, 1894. Affirmed May 14, 1894.

No. 8769.

A promissory note construed to be joint and several.

Where one of the makers of a promissory note signs it on its face, and by its terms he in the singular form promises to pay the amount of the note, and before delivery the other makers sign it on the back of it, *held*, the note is joint and several as to all the defendants. *Held*, further, the holder of such a note may treat it as several.

Several judgments entered and afterwards sanctioned by the court.

Where the payee of such a note brought suit on it against all of the makers, and obtained personal service of the summons on all of them, and after the time to answer expired as to all of them, and they were all in default for want of an answer, he entered judgment by default against the maker who signed the note on its face and one who signed it on the back of it, and seventeen months afterwards, by leave of court given *ex parte*, he entered up another judgment against another defendant, who signed the note on the back of it, and the court afterwards denied the motion of this defendant to set aside this second judgment, *held* that, if the plaintiff did not have an absolute right under 1878 G. S. ch. 66, § 67, to enter such separate judgments against different defendants, he had a right to do so by obtaining leave of the court, as provided in section 265 of said chapter, and his failure to obtain such leave before entering the first judgment was cured by the subsequent orders of the court.

Payment after service and before judgment credited on the execution.

Where, between the time said defendant was in default for want of an answer and the entry of judgment against him, another defendant made a payment on the note, but in the entry of judgment no credit was allowed for the same, but when execution was issued thereon the amount so paid was credited on the execution, and the defendant afterwards made a motion to set the judgment aside. *held*, the defendant not being deprived of any substantial right, the irregularity in the entry of judgment was one which the court in its discretion had a right to disregard, and it was not error to deny the motion.

Appeal by R. P. Russell, one of the defendants, from an order of the District Court of Hennepin County, *Charles M. Pond, J.*, made

October 25, 1893, denying his motion to vacate a judgment entered against him January 6, 1893, for \$5,413.70.

On July 2, 1889, Timothy A. Bowen borrowed of the plaintiff, Peter Wolford, \$4,000, and gave him his several note for that sum with interest at ten per cent a year due six months thereafter. Prior to its delivery the defendants, J. E. Thwing, Mary A. Thwing, his wife, and R. P. Russell, to give it credit wrote their names across its back and afterwards waived presentation demand, protest and notice. The note was not paid and on June 15, 1891, plaintiff commenced this action thereon against the four parties as joint and several makers thereof. All were personally served and all made default and on July 23, 1891, Mary A. Thwing paid plaintiff on the note \$807.63. On July 30, 1891, judgment was at Russell's instance entered against Timothy A. Bowen and J. E. Thwing only for \$4,838.72. Execution was issued thereon and delivered to the sheriff, but was returned August 29, 1891, wholly unsatisfied. Russell then assigned to plaintiff a mortgage for \$4,000 as collateral security for the debt. On January 6, 1893, plaintiff applied to the court *ex parte* without notice to Russell and obtained an order that he be allowed to enter another judgment in this action against Russell for the amount claimed in the summons. On the same day such second judgment was entered against Russell alone for \$5,413.70. Execution was issued on this judgment and the \$807.63 indorsed upon it as a payment. Russell was notified soon after of the entry of this judgment but made no objection until October 23, 1893, when he moved the court on notice to set aside this last judgment on the ground of irregularity and because it was in excess of the amount due and because of the former judgment. The court denied the application and he appeals from the order.

Harrison & Noyes, for appellant.

All the defendants were makers of the note. None were indorsers. *Stein v. Passmore*, 25 Minn. 256; *Wager v. Brooks*, 37 Minn. 392; *Peckham v. Gilman*, 7 Minn. 355.

They were joint makers and not several. *Brady v. Reynolds*, 13 Cal. 32; *Wallace v. Goold*, 91 Ill. 15; *Collins v. Trist*, 20 La. An. 348; *Morienthal v. Taylor*, 2 Minn. 147.

Plaintiff's cause of action was merged in the first judgment and the second is void and should have been vacated and stricken out of the roll. *Lauer v. Bandow*, 48 Wis. 638; *Reynolds v. Pittsburgh, C. & St. L. Ry. Co.*, 29 Ohio St. 602; *Bowen v. Hastings*, 47 Wis. 232; *Kennard v. Carter*, 64 Ind. 31.

Boardman & Boutelle, for respondent.

No copy of the note appears in the return to this court. As it was signed on the face by Bowen only it is presumed to read, "I promise to pay, &c." The trial court held the note to be joint and several. If this were doubtful why did not appellant put a copy of the note into the record so that he could review that question. All the parties must be deemed joint and several makers. *Good v. Martin*, 95 U. S. 90; *Union Bank v. Willis*, 8 Met. 504; *Riley v. Gerish*, 9 Cush. 104; *Coleman v. Parker*, 11 Gray, 335.

Under 1878 G. S. ch. 66, § 67, subd. 3, plaintiff having joined in one action parties severally liable, may take judgment against one without losing the right to proceed in the action against the others. *Pomeroy Remedies*, § 408.

The motion was not made with due diligence, and relief will be denied for laches. *Altmann v. Gabriel*, 28 Minn. 132.

CANTY, J. Plaintiff, in June, 1891, brought this action on a promissory note, alleging in his complaint that defendant Bowen made and delivered said note to plaintiff, thereby promising to pay plaintiff or order the sum of \$4,000, and that prior to the delivery of the note, and for the purpose of giving it credit, the defendants Mary A. Thwing, J. E. Thwing, and R. P. Russell duly indorsed their names on the back thereof.

The summons was then duly and personally served on all of the defendants, but none of them answered, and after the time to answer expired as to all of defendants, and when they were all in default for want of an answer, on July 30, 1891, on motion of plaintiff, judgment by default was entered against the defendants Bowen and J. E. Thwing, but not against defendants Russell or Mary E. Thwing. Prior to this, on July 23, 1891, Mary E. Thwing paid \$807, and, nearly a year and one-half after the entry of this judgment, plaintiff, on an *ex parte* order of the court giving him

leave to do so, entered a second judgment against Russell alone for the whole amount of the original debt, interest, and costs, issued execution thereon, and credited the amount paid by Mary E. Thwing on the execution. Thereafter, on October 21, 1883, defendant Russell moved to set aside said judgment, on the grounds hereinafter discussed and on other grounds. The motion was denied, and he appeals.

It is urged by appellant that the obligation of the defendants, as makers of the note in suit, was joint, and that the cause of action was merged in the first judgment, whether it was against all or only a part of the joint debtors, and that no second judgment could be entered against Russell.

We are of the opinion that the original obligation of the makers of the note was both joint and several. It is well settled that a note which reads, "I promise to pay," signed by several makers, is joint and several. It is fairly to be understood from the complaint in this case that the promise in the note is in form in the singular,—the promise of Bowen alone. It is held that the other makers who signed their names on the back before delivery also signed this promise in the singular form. The principle is just the same,—the note is both joint and several. It is not necessary to decide whether or not the joint and several nature of the obligation of makers thus placing their names on the back of a note may also be put on the ground stated in *Riley v. Gerrish*, 9 Cush. 104, that the holder of the note may fill up the blank so as to charge such an indorser as a joint and several promisor. Whether we put it on one or the other of these two grounds, the note in question is joint and several. If a contract is both joint and several, the obligee may treat it as several.

1878 G. S. ch. 66, § 67, subd. 3, provides "Although all the defendants have been served with the summons, judgment may be taken against any of them severally, when the plaintiff would be entitled to judgment against such defendants if the action had been against them alone."

It is true that section 265 of the same chapter reads as follows: "In an action against several defendants the court may in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment

is proper." Even if it should be held that the former section is controlled by the latter, and that the court should have ordered a separate judgment against the defendants Bowen and J. E. Thwing, reserving the right to afterwards enter judgment against Russell, which we do not decide, still the failure to get such an order would be a mere irregularity, which the court in its discretion could cure and did cure by its subsequent order giving leave to enter judgment against Russell, and its subsequent order refusing to set this judgment aside. See *Turner v. Holleran*, 8 Minn. 451 (Gil. 401).

The same may be said as to the irregularity of entering judgment against Russell for the whole sum originally due, and interest, and crediting on the execution the amount paid by Mary E. Thwing. It was in the discretion of the court below to order or hold that this irregularity in the entry of the judgment was cured by the credit on the execution, as no substantial rights were there involved, and the order denying the motion to set aside the judgment had the effect so to order or hold.

These are all the points raised by appellant's assignments of error, and the judgment appealed from should be affirmed. So ordered.

Buck, J., absent, sick, took no part.

(Opinion published 59 N. W. 195.)

BERTHA SCHULZ vs. CHICAGO, MILWAUKEE & ST. PAUL RY. CO.

Submitted on briefs April 30, 1894. Reversed May 14, 1894.

No. 8697.

The questions of negligence should have been submitted to the jury.

Where a section man, working on or dangerously near to the railroad track, is unaware of an approaching train, and by reason of peculiar or exceptional circumstances is not likely to discover it in time to save himself from injury, and this should be apparent to the persons managing the train if they were using reasonable care: *Held*, in such a case, it is the duty of such persons to give such section man reasonable warning of the approach of the train. *Held*, further, it was a question for the

57	271
65	390

57	271
86	472

jury whether, in this case, the facts and circumstances above recited were established by the evidence, and it was error to refuse to submit the case to the jury. *Held*, further, that under the evidence in this case, assuming that the trains were run at a high or dangerous rate of speed, the section man assumed that risk, but not the risk of the engineer neglecting to give the signal or warning that the exceptional circumstances required him to give.

Appeal by plaintiff, Bertha Schulz, as administratrix of the estate of Julius Schulz, deceased, from an order of the District Court of Ramsey County, *Chas. D. Kerr, J.*, made July 6, 1893, denying her motion for a new trial.

On June 19, 1891, Julius Schulz was at work as a section man for the defendant, Chicago Milwaukee and St. Paul Railway Company near Highwood Station in St. Paul and was struck by a train under the circumstances stated in the opinion. He died and plaintiff was on January 9, 1893, appointed administratrix of his estate, and brought this action under 1878 G. S. ch. 77, § 2. At the trial on May 26, 1893, after plaintiff's evidence was all in, the defendant asked for a dismissal of the action on the ground that there is no evidence tending to show that defendant was negligent in the premises, that the accident was within the risks assumed by the servant, and that the servant was himself guilty of contributory negligence. The court granted the motion; plaintiff excepted, moved for a new trial and being denied appeals.

A. T. Faber and Lewis E. Jones, for appellant, cited *Goodfellow v. Boston H. & E. R. Co.*, 106 Mass. 461; *Barton v. New York Cent. & H. R. R. Co.*, 56 N. Y. 660; *Crowley v. Burlington, C. R. & N. R. Co.*, 65 Ia. 658; *Cordell v. New York Cent. & H. R. R. Co.*, 65 N. Y. 535; *Erickson v. St. Paul & D. R. Co.*, 41 Minn. 500; *Evison v. Chicago, St. P., M. & O. Ry. Co.*, 45 Minn. 370.

F. W. Root and W. H. Norris, for respondent, cited *Aerkfetz v. Humphreys*, 145 U. S. 418; *Connelly v. Minneapolis Eastern Ry. Co.*, 38 Minn. 80; *Bengtson v. Chicago, St. P., M. & O. Ry. Co.*, 47 Minn. 486.

CANTY, J. Plaintiff's intestate was in the employ of defendant as a section man on its railroad. At the time of the injury in

question he was at work cutting weeds with a shovel along the side of its track within the corporate limits in the southern part of the city of St. Paul. He cut a space about six feet wide along outside of the rail, and stood in the middle of this space as he worked, in a stooping position, with his back to the approaching train of defendant, turning partly to one side and then to the other as he proceeded. Running parallel with this track, and about 100 feet away from it, was the track of another railroad company, on which a train was at the time approaching from the opposite direction. About the time the last car of this train passed by him, and as he turned partly towards the track of defendant on the side of which he was at work, the train approaching from behind him struck him on the side of the head, knocked him down, and from the injuries received he died shortly afterwards. The section man who worked across the track directly opposite him, and the other men who worked with him, testified that they heard no sounding of the whistle or ringing of the bell or other warning of the approach of defendant's train, and it is fairly to be inferred from the evidence that deceased continued his work, and was wholly unaware of the approach of this train until struck by it as he turned towards the track in a stooping position, in the act of cutting weeds. At the close of plaintiff's testimony the court dismissed the action, and, from an order denying a motion for a new trial, plaintiff appeals.

We are of the opinion that the court below erred in taking the case from the jury. True, it is a general rule that section men assume the risk of being injured by approaching trains, that it is not under ordinary circumstances customary to give them notice or warning of the approach of trains, and that they must ordinarily look out for themselves; still there are exceptions. The track on which this train was approaching was straight for about 1,800 feet, and the deceased could be seen for that distance before the train reached him. It was a question for the jury whether the persons managing the train, if they had been exercising proper care, would not have discovered that deceased was unaware of its approach; that the noise made by the other train approaching from in front of him prevented him from hearing this train approaching from behind him, and that he was in a perilous position, which made it

their duty to give him some proper signal to warn him of its approach. *Erickson v. St. Paul & Duluth R. Co.*, 41 Minn. 500, (43 N. W. 332.) The evidence tended to prove that no such signal was given. His contributory negligence, under the circumstances, is also a question for the jury.

Plaintiff gave in evidence an ordinance of the city of St. Paul prohibiting the running of trains within the city limits at a greater rate of speed than four miles per hour. While there was evidence tending to prove that the train ran at the rate of thirty or forty miles per hour, it also appeared by the evidence that this part of the city was sparsely settled, and there was no street crossing the track for about two miles. The ordinance was unreasonable and void as between the railroad company and the general public. *Evison v. Chicago, St. P., M. & O. Ry. Co.*, 45 Minn. 370, (48 N. W. 6.) Whether such an ordinance has any application at all as between the company and a section man as to what is a negligent rate of speed, *Bengtson v. Chicago, St. P., M. & O. Ry. Co.*, 47 Minn. 486, (50 N. W. 531) it is not necessary to determine. It appeared by the evidence that the defendant usually ran its trains at this place at this high rate of speed, which the deceased must necessarily have known, and hence he assumed the risk.

The other assignments of error are without merit.

The order appealed from is reversed.

Buck, J., absent, sick, took no part.

(Opinion published 59 N. W. 192.)

ANDREW NIPPOLT vs. FIREMEN'S INS. CO. OF CHICAGO.

57 275
60 354

Argued May 2, 1894. Reversed May 14, 1894.

No. 8660.

Custom for insurer to renew expiring fire policy.

A particular custom or usage of trade, to be valid, must be uniform and certain, and, in the absence of special agreement, not optional with those to whom it applies, and the party bound by it must have knowledge of it, unless it is so general, well established, and notorious that he may be presumed to have notice of it, or unless he is engaged in the same line of business himself to such an extent that knowledge of it may be presumed. *Held*, a person having no connection with the insurance business except occasionally to take out policies of insurance on his property is not ordinarily presumed to have knowledge of its customs. *Held*, further, a person having no knowledge or notice of such a custom cannot take advantage of it. *Held*, further, that plaintiff failed to prove any such certain and uniform custom for insurance agents to renew expiring fire insurance policies in the same or other insurance companies without the special request of the insured, either express, or implied from the particular course of dealing between him and the agent.

Antedated policy obtained after loss.

Where a loss by fire occurred a few days after a policy of insurance on the property expired, and the insured, on learning of the loss, and knowing that the agent who had issued the policy had not learned of it, inquired of such agent if he had renewed the insurance, and immediately afterwards received a new policy from the agent, dated back to the time of such expiration prior to the fire, he concealed from the agent the fact of such loss, and there being no agreement prior to the fire for such new insurance: *Held*, such renewed policy was void for the fraud of the insured. *Held*, further, it is immaterial whether such new policy was actually drawn up and signed before or after the fire; in either case, there was no agreement to insure, and the policy did not take effect until after the fire.

Appeal by defendant, the Firemen's Insurance Company of Chicago, Ill., from an order of the District Court of Ramsey County, Charles D. Kerr, J., made September 25, 1893, denying its motion for a new trial after verdict in favor of plaintiff, Andrew Nippolt, for \$857.20.

Kueffner, Fauntleroy & Searles, for appellant.

T. R. Palmer, for respondent.

CANTY, J. Plaintiff was the owner of a carriage manufacturing establishment in St. Paul. His brother-in-law was the special agent of the Denver Insurance Company, and on January 9, 1891, he procured plaintiff to take out a policy of insurance in that company, insuring plaintiff's stock in trade to the amount of \$1,000 for one year, and the policy was signed and delivered by L. R. Ware, the local agent. Plaintiff, during the year, procured from other agents two other policies of insurance in other companies on this stock for the amount of \$1,000, each of which was in force at the time of the fire hereinafter mentioned. The policy issued by the Denver Insurance Company expired on January 9, 1892, and in the mean time it had gone out of business in this state. Five days later—on the night of January 14th—plaintiff's stock in trade was damaged by fire. Next morning, on discovering his loss, plaintiff telephoned to the insurance agents, E. M. & L. W. Ware (who had succeeded L. W. Ware in business), and asked them if the policy in the Denver Insurance Company, which had expired, had been renewed. They answered that it had, and he immediately sent his bookkeeper to their office to get it, and they delivered to him the policy here in suit, dated January 9, 1892, purporting to be issued by the defendant company, and to insure plaintiff's stock in trade against loss by fire to the amount of \$1,000 for one year from that date. At the time the agents delivered the policy to the bookkeeper they were ignorant that the fire had occurred, but learned of it immediately afterwards, and demanded a return of the policy, and disavowed any liability of defendant under it.

Plaintiff's loss was \$2,250. He recovered from the other companies \$2,000, the amount of the other two policies. But all three of these policies contained pro rata clauses, and he entered into an agreement with the other two companies to prosecute this suit, and, if successful, to pay them back the excess over their pro rata share; and accordingly this suit was brought to recover of defendant one-third of the loss, and plaintiff recovered a verdict.

The defendant claims that said policy so received by plaintiff from its agents after the fire was in fact drawn up between the time of the telephone inquiry and the time the bookkeeper of plaintiff received it at the agents' office. Plaintiff claims that, it being dated on January 9th,—five days before the fire,—it was a question

for the jury whether it was not drawn up on that day; but for the reasons hereinafter stated we are of the opinion that it is immaterial on which day it was in fact drawn up.

The plaintiff does not claim that before the fire he ordered any renewal of the insurance which would expire with the Denver policy, except, as he claims, that such order would be implied by custom. He claims that there is a universal custom in this state, long prevailing between insurance companies, agents, and parties insured, to renew policies on the same terms, unless notice be given to the contrary by the agent to the insured.

Whatever might be claimed for such a custom, it is only necessary to remark that his proof on the trial wholly failed to establish it. Most of the insurance agents called by him as witnesses to prove this custom testified that they had a class of customers with whom they had an understanding to renew policies in the same or other companies; that they had another class to whom they usually sent notice at or before expiration, and solicited renewal, and sometimes sent them new policies, with the request, if not accepted, to return them; and that they had other customers, whose risks were undesirable, to whom they might give notice and they might not.

But all of the witnesses testified in substance that, except as to the first class, the issuance and acceptance of a renewal policy was wholly optional; and none of the witnesses except one or two knew anything about what the custom was outside of his own office.

It is well settled that a custom, to be valid, must be uniform and certain. *Lawson, Usages & Cust.* §§ 9, 10. It must be compulsory, and of binding force; not optional. *Id.* § 11. The party to be bound by the custom must have knowledge of it. *Id.* § 19. The custom may be so general, long-established, and notorious that the party is presumed to have knowledge of it, and he may also be engaged in the same line of business himself to such an extent that he may be presumed to have knowledge of its customs. But a person having no connection with the insurance business except occasionally to take out policies of insurance on his own property is not presumed to have knowledge of its customs. *Hartford P. Ins. Co. v. Harmer*, 2 Ohio St. 452; *Hill v. Hibernia Ins. Co.*, 10 Hun, 26.

It does not appear that plaintiff had any knowledge of any such custom; on the contrary, it sufficiently appears that he had not. Then, if such a custom existed, and it was valid, it would not bind the plaintiff to pay the premium for such a renewal of policy; and, unless he was himself bound by such a custom, he cannot hold the opposite party. A party having no knowledge of a custom cannot take advantage of it. Lawson, Usages & Cust. § 28. Not only had plaintiff no knowledge of any such custom, but he testifies that he expected the insurance to be kept up in the Denver Company. Then it necessarily follows that plaintiff was not bound to accept this policy, or pay the premium on it, until he actually did accept it, which was after the fire; and, even if the policy was drawn up before the fire, as plaintiff claims, it did not become a contract of insurance between him and defendant until he so accepted it; and it was a fraud on his part thus to enter into such a contract after the loss, knowing that loss and failing to disclose it to the other party to the contract, whom he knew was ignorant of it, and thereby procure that other party to insure him against a loss which had already occurred. For these reasons plaintiff was not entitled to recover, and the order denying defendant's motion for a new trial should be reversed, and a new trial ordered.

So ordered.

Buck, J., absent, sick, took no part.

(Opinion published 59 N. W. 191.)

HERMAN E. LONG *vs.* JOHN GIERIET.

Submitted on briefs May 3, 1894. Affirmed May 15, 1894.

No. 8678.

Landlord and Tenant.

Where the landlord agreed to make improvements for the benefit of the tenant, *held*, his failure to make them does not relieve the tenant in possession from liability to pay rent. *Held*, further, in such case the tenant is entitled to damages, the measure of which is the difference between the rental value of the premises without the improvements and their rental value with the improvements.

Note held not to be accommodation paper.

Where A. said to B., "Give me your promissory note, so I can raise money on it," *held*, it is not presumed the note was given for accommodation, and without consideration, when it appears that B. was indebted to A. on open account to at least the amount of the note.

Ordering verdict.

Held, on the evidence in this case, the court below did not err in ordering a verdict for plaintiff.

Appeal by defendant, John Gieriet, from a judgment of the District Court of St. Louis County, *Charles L. Lewis, J.*, entered against him May 20, 1893, for \$1,660.29.

On February 2, 1891, the plaintiff, Herman E. Long, leased the unfinished Tremont House, No. 12 Lake Avenue North in Duluth to defendant for three years from the time it should be completed. Defendant took possession in June, 1891, and opened the hotel. On January 2, 1892, defendant gave to plaintiff four notes for \$2,400 rent then past due and secured the first three notes February 20, following by mortgage on his hotel furniture. The debt was not paid and plaintiff took the goods and sold them July 22, 1892, under a power in the mortgage and applied the proceeds \$969 upon the debt. He brought this action on the notes for the unpaid balance. The defendant answered as stated in the opinion. Plaintiff had a verdict by direction of the Judge for the balance due on the notes. Judgment was entered thereon and defendant appeals.

Austin N. McGindley and George L. Spangler, for appellant.

J. H. Bingham, for respondent.

CANTY, J. The question of whether or not the reply was served in time was a question of fact to be decided by the court below on the conflicting affidavits. Plaintiff was erecting a four-story building in Duluth, and in February, 1891, when the walls of the first story were up, leased a part of the first floor and basement and the three upper floors to defendant by a written lease for three years from May 1, 1891, at a rent ranging from \$325 per month during the first part of the term to \$375 per month during the last part of it, payable monthly in advance. The defendant went into possession between June 15th and July 1st of the same year, and remained in possession until about the last of July, 1892, when he was put

out of possession by forcible entry and detainer proceedings brought by plaintiff. During this time defendant also held, under two other leases from plaintiff, other adjoining premises, so that the total rent due from him to plaintiff under the three leases was from \$450 to \$475 per month.

On January 2, 1892, he gave plaintiff the three negotiable notes here in suit for the sum of \$2,000, and on the 20th of February following secured the same by a chattel mortgage on his hotel furniture in the leased premises.

The defendant, in his answer, alleges that at the time of making said first-named lease plaintiff agreed to put an elevator, a system of electric bells, and gas and electric light fixtures into the building for defendant's use as a part of the leased premises; that he failed to do so; and that he fraudulently induced defendant to make the notes and chattel mortgage by representing to defendant that he would still do so, which he has never done; and that there was no consideration for the notes and mortgage.

The defendant set up as a counterclaim the conversion by plaintiff of the mortgaged property by taking possession of it and foreclosing this mortgage so alleged to be void. At the close of the testimony the court ordered a verdict for plaintiff, and from the judgment entered thereon defendant appeals.

On the trial the court permitted defendant to introduce evidence to prove, subject to plaintiff's objection, that plaintiff so agreed to put such elevator, electric bells, gas and electric fixtures into the building as a part of the leased premises. Plaintiff claimed this evidence was incompetent, as it would contradict the written lease, and that the court below so decided in ordering a verdict for defendant. It is not necessary to decide whether such evidence was or was not competent. As long as defendant remained in possession, the failure to put in these improvements as agreed would not, as claimed by defendant, relieve him from the liability of paying rent. At most, such failure gave him only a claim for damages, the measure of which is the difference between the rental value of the leased premises with the improvements and their rental value without the improvements. There was no evidence to show this difference either offered or received.

This disposes of defendant's claim that the notes, even if given

for rent, were without consideration, because he was under no liability to pay rent. But defendant claims that the notes were not given for rent, as claimed by plaintiff.

Defendant testified that plaintiff said to him, "I need money, and I cannot put in those improvements unless I have money." "If you will give me notes, so I can raise money on the notes and mortgage, then I can go ahead and put in the improvements right away, so you can make money in good shape." The defendant nowhere testifies that plaintiff agreed to take care of the notes after he raised money on them, or that there was any express agreement that the notes were given to plaintiff merely for his accommodation. Of course, if defendant was not indebted to plaintiff, this would be implied. But it sufficiently appears, though he claims otherwise, that he was so indebted at least to the amount of the notes. Then it must be presumed that these notes were given as evidence of this indebtedness, whether plaintiff wanted them to raise money on them or not. Then we may take into consideration, in connection with this, that defendant's answer in the forcible entry suit was introduced in evidence for the purpose of proving his sworn statement in that answer that these notes were given for rent. His failure to make that answer a part of the settled case, to say the least, only increases the presumption that the action of the court in ordering a verdict was justified by the evidence. The defendant failed to rebut the presumption of consideration which the law makes in favor of the notes. But we may add to this the clear and satisfactory evidence introduced on behalf of plaintiff that the notes were given for rent. The other assignments of error are without merit.

The judgment appealed from should be affirmed. So ordered.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 194.)

Application for reargument denied May 28, 1894.

In re TIMOTHY HESS' ESTATE.

Argued April 27, 1894. Affirmed May 15, 1894.

No. 8619.

Evidence of the conversations of a deceased person.

Where a witness who is a party to the suit, or interested in the result thereof, is required on cross-examination to state a conversation with a person since deceased, *held*, the party so cross-examining thereby waives the protection of the statute, and, on redirect examination, such witness is competent to give the whole of such conversation, or to qualify or explain the same by other conversations with the deceased, relating to the same transaction.

Former statements of a witness to affect his credibility.

Held, the mere fact that a party to the suit gave evidence in a former suit between the same parties contradicting his evidence in the present suit does not conclude him as a question of law, but the effect to be given to his evidence is a question for the jury.

Statute of limitation of actions.

When services are rendered by one party to another under an agreement that the former shall be compensated out of the estate of the latter at the time of his death, *held*, the statute of limitations does not commence to run against the claim until the time of the death of the latter.

Appeal by James Hess, executor, and Ella Dearborn, executrix, of the will of Timothy Hess, deceased, from an order of the District Court of Winona County, *Charles M. Start, J.*, made August 1, 1893, denying their motion for a new trial.

Timothy Hess, a farmer residing in Wiscoy, Winona County, died testate in December, 1889. The will was after contest admitted to probate. *In re Hess' Will*, 48 Minn. 504. His daughter Mary Foster filed a claim for services as his housekeeper from September 1, 1874, to May 1, 1886, at \$4 per week, \$2,416, less a credit of \$604 paid thereon. The Probate Court allowed her \$1,244. The executors appealed to the District Court where pleadings were made up as in civil actions, pursuant to Laws 1889, ch. 46, § 260. The claimant stated in her complaint that at the request of deceased she performed services for him as housekeeper on his farm from September 1, 1874

to May 1, 1886, continuously except for about ten months in 1877 and 1878, that he promised her that she should be paid therefor partly from time to time and the balance out of his estate after his death, that her services were worth \$4 per week and that she had been paid \$604, and she prayed judgment for the balance, \$1,828. The executors for answer made a general denial and alleged that the payment exceeded the value of the services and that the cause of action did not accrue within six years next preceding the testator's death. At the trial the claimant was permitted after objection and exception to prove that the value of the estate was \$5,000. The executors afterwards proved the same value. She was a witness to prove her services and their value. On cross-examination she was asked about the promise made to her by her father so far as to show that he agreed to pay her \$1 a week until the mortgage on the farm was paid off and \$2 a week thereafter and that he paid these sums amounting to \$604 which she allowed in the complaint. On redirect examination she was allowed after objection and exception to state the entire conversation as to the contract. The jury found for the claimant and assessed her damages at \$736.50. They returned a special verdict that they did not include in the general verdict anything for her services prior to October, 1877. The executors moved for a new trial. The court denied the motion on condition that the claimant consent that the verdict be reduced to \$500. She consented. The executors appeal from the order.

Lloyd Barber, for appellants.

The value of Hess' estate was immaterial and the evidence of its value was prejudicial.

On the cross-examination of the plaintiff she was questioned as to admissions she had made on oath when testifying as a witness on the trial of the contest of the will of Timothy Hess in reference to the agreement between herself and her father under which she kept house for him. There was no objection to this examination. On being re-examined she was asked and permitted to state all the conversation with her deceased father in direct violation of the statute. 1878 G. S. ch. 73, § 8. This was error. If the cross-examination of the claimant called for a conversation between her and her father the extent to which she could testify on that question on redirect ex-

amination would be to give the remainder of that conversation if any had been omitted. *Hathaway v. Brown*, 18 Minn. 414; *Rhodes v. Pray*, 36 Minn. 392; *Rouse v. Whited*, 25 N. Y. 170; *Nay v. Curley*, 113 N. Y. 575; *Prince v. Samo*, 7 Ad. & E. 627.

Brown & Abbott, for respondent.

The evidence as to the value of Hess' estate was not prejudicial. The value was in fact admitted. *Schwab v. Pierro*, 43 Minn. 520.

The cross-examination of the claimant as to a part of the conversation with her deceased father gave her the right to contradict or explain it on redirect examination. *Teague v. Irwin*, 134 Mass. 303; *State v. Witham*, 72 Me. 531; *Mowry v. Smith*, 9 Allen, 67; *Furbush v. Goodwin*, 25 N. H. 425; *Merritt v. Campbell*, 79 N. Y. 625; *Nay v. Curley*, 113 N. Y. 575.

CANTY, J. The claimant, Mary Foster, was the daughter of Timothy Hess, and after the death of his wife, in 1874, performed services in keeping house and doing domestic work for him and her brother until 1877, and did the same character of work for him again from 1878 to 1886. He died in 1889.

She filed a claim against his estate for these services, alleging that he agreed with her that she should be paid what her services were reasonably worth out of his estate at the time of his death; that said services were worth \$4 per week for all of said times; and that no part thereof had been paid except \$604. An appeal was taken from an allowance of her claim in the Probate Court. She recovered a verdict in the District Court for the last period of her service of \$736.50. The court, on motion for a new trial, cut the verdict down to \$500, and, on her acceptance of that sum, denied the motion for a new trial, and the executors appeal.

The first assignment of error is not well founded. The court admitted immaterial evidence against the objection that it was immaterial, and the defendants proved the same facts themselves by other evidence. The claimant was a witness on her own behalf, but was not allowed on her examination in chief to testify to any conversations with the deceased. On cross-examination she was questioned about the terms of this contract between her and deceased as to her services, so as to draw out from her the statement that her father

agreed to pay her \$1 a week for a part of the time, and \$2 a week for the rest of the time of her service, and that he had paid her these sums, amounting in all to \$604. On redirect examination the witness testified, against defendants' objection and exception, that her father agreed to pay her this as pin money, or for her current expenses, but also agreed that she should be paid the balance of what her services were worth out of his estate after his death. This is assigned as error. The statute makes any person a party to or interested in the result of a suit incompetent to testify to conversations with a deceased person. But the opposite party must respect this statute himself. If he cross-examines such a witness as to such conversations, so as to bring out a partial statement of any such conversation, he thereby waives the statute, and on redirect examination the witness is competent to give the whole of such conversation, or qualify or explain the same.

The claimant also admitted on said cross-examination that, in a former proceeding to contest the will of deceased, she testified that she was to get but \$1 a week for a part of her service, and \$2 a week for the rest, and that her father did not owe anything when he died. Defendants excepted to the refusal to give instructions asked by them to the effect that the claimant was concluded by this testimony, and could not explain or contradict it, and, for the same reason, excepted to parts of the charge given, and assign this as error. It was not error. It was a question for the jury to decide on the effect of this contradictory evidence, not for the court. The refusal of the court to charge that the statute of limitations had run against this claim is assigned as error. If, as the jury found, it was agreed that the claimant should be paid out of the estate of deceased at the time of his death the contract was valid,—*Schwab v. Pierro*, 43 Minn. 520, (46 N. W. 71;) and the statute did not commence to run until that time.

The other assignments of error are without merit, and the order appealed from should be affirmed. So ordered.

BUCK, J., absent, sick, took no part.

(Opinion published 50 N. W. 198.)

EDWARD P. DENNIS *vs.* ANSON B. JACKSON *et al.*

Submitted on briefs May 9, 1894. Affirmed May 15, 1894.

No. 8644.

The implied contract of indorsement not to be varied by parol.

Where a party signs his name on the back of a promissory note before delivery, for the purpose of giving it credit: *Held*, he cannot show by parol that his agreement was that of indorser, and not of maker. *Held*, further, that the fact that he was indorser of a prior note, for which this note was substituted, will not change the rule.

Appeal by defendant, Frederick A. Dunsmoor, from an order of the District Court of Hennepin County, *Henry G. Hicks, J.*, made December 9, 1893, striking out his answer as sham.

On December 2, 1889, defendant, Anson B. Jackson, made his negotiable promissory note for \$1,110 payable to the order of Otis M. Humphrey three years thereafter with interest semiannually. Dunsmoor wrote his name across the back of this note and it was then delivered to Humphrey. He afterwards sold and transferred the note before due to the plaintiff Edward P. Dennis. The interest was paid to December 2, 1892. Dennis brought this action against Jackson and Dunsmoor to recover the amount of the note with interest after its maturity.

Dunsmoor alone answered. He alleged that it was agreed between him and Humphrey when he wrote his name on the back of the note that he should be regarded and treated not as maker but as indorser, that the note was given in renewal of one on which he was indorser and the agreement was that he should remain on the new note in the same situation he was in upon the old note, that when this new note fell due it was not protested for nonpayment or notice given him, and that for that reason he was discharged. Plaintiff moved the court on notice to strike out this answer as sham and irrelevant and for judgment as for want of an answer. The court granted the order and directed judgment to be entered as for want of an answer. The defendant Dunsmoor did not wait for judgment to be entered, but appealed from this order (*Croft v. Miller*, 26 Minn. 317.)

C. A. Bucknam, for appellant.

Plaintiff takes the position that the answer pleads a parol agreement between Humphrey and Dunsmoor contradicting the terms of a written contract. Now the written contract if it be one, is made up of Dunsmoor's signature and a statement of the time of putting it on the note and a statement that it was so put there to induce credit. Dunsmoor contends that the answer discloses an express original contract which may be shown by parol evidence. *Buck v. Hutchins*, 45 Minn. 270; *Holmes v. First Nat. Bank*, 38 Neb. 326; *Bailey v. Stoneman*, 41 Ohio St. 148; *Good v. Martin*, 95 U. S. 90.

The question is, where shall the liability of Dunsmoor rest, whether upon an implied or upon an express contract. That issue is raised by the answer. It does not contradict a written contract. *Allis v. Leonard*, 46 N. Y. 688; *Wirgman v. Hicks*, 6 Abb. Pr. 17; *Richter v. McMurray*, 15 Abb. Pr. 346; *Griffin v. Todd*, 48 How. Pr. 15; *Howell v. Knickerbocker Life Ins. Co.*, 24 How. Pr. 475.

Savage & Purdy, for respondent.

The answer pleads in substance, though in a very argumentative manner, that the appellant indorsed the note before its delivery at the request of the payee with the understanding that he should be liable only as indorser, and this was done to induce the payee to accept it. This makes a case exactly identical with that decided in *Peckham v. Gilman*, 7 Minn. 446; *Stein v. Passmore*, 25 Minn. 256.

CANTY, J. This is an action brought on a promissory note made by the defendant Jackson to one Humphrey, and on the back of which it is alleged the defendant Dunsmoor wrote his name, before delivery to Humphrey, for the purpose of giving it credit. The complaint further alleges that before maturity Humphrey indorsed and transferred the note to plaintiff.

The answer of defendant Dunsmoor admits the making of the note, and that he wrote his name on the back of it before delivery to Humphrey, but denies that it was for the purpose of giving it credit; and alleges as a defense that this is a renewal of a prior note, made by a third party to defendant Dunsmoor, which was secured by mort-

gage, which note he (Dunsmoor) sold, indorsed, and delivered to Humphrey, and also assigned to him the mortgage; that this note and mortgage came due on December 20, 1889; that prior to that time, on December 2, 1889, Jackson, who had in the meantime become the owner of the mortgaged real estate, made the note in suit to Humphrey, and secured it by a new mortgage; that before the delivery of this note to Humphrey defendant Dunsmoor indorsed it on the back of it, at the request of Humphrey to make the same indorsement on the back of the new note that he had on the old one; and at the time the note was indorsed to plaintiff he had knowledge of this fact. This answer, on motion of plaintiff, was ordered to be stricken out as sham and frivolous, and from this order Dunsmoor appeals.

We are of the opinion that the order appealed from should be affirmed. Appellant admits that he wrote his name on the back of this note before delivery. The legal effect of this was to constitute him an absolute maker or promisor, and an absolute surety on the note, and not a conditional one. He cannot vary the legal effect of his written contract by parol evidence. This applies to a blank indorsement on a note as well as it does to a contract written out in full. A defendant who signed his name on the back of a note before delivery cannot show that there was a parol agreement made at the same time that he was to be charged as indorser, and not as maker. *Peckham v. Gilman*, 7 Minn. 446 (Gil. 355.) It is always competent to prove by parol the time of delivery of a written instrument, even though such proof may change the legal effect of the instrument. Thus it is competent to prove that a contract dated on Sunday was in fact made and delivered on a week day. *State v. Young*, 23 Minn. 551; *Schwab v. Rigby*, 38 Minn. 395, (38 N. W. 101.) The date of delivery is not a part of the written instrument, but an extrinsic fact. When the time of delivery is ascertained, and the instrument so delivered identified, then parol evidence cannot go further, and add oral words to the written words identified. If, in a case like the present, words are to be added, the law alone must add them. The defendant's answer shows that his contract as to the second note was different from that as to the first note, and also that he signed this second note to give it credit, though in form he denies this.

No point is made as to whether or not this answer should have been assailed by demurrer instead of a motion to strike it out, and no point is made as to whether or not this is an appealable order, and we are not to be understood as deciding either point. Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 198.)

JAMES N. CASTLE *et al.* vs. ELDER *et al.*

Submitted on briefs May 10, 1894. Affirmed May 15, 1894.

No. 8637.

Deed construed to convey all riparian rights.

Where a deed conveys land bordering on a lake by a description, the calls for the eastern boundary of which are: "Thence east to the shore of the lake; thence north, along said lake shore, to a certain point; and thence west," etc.,—*held*, it conveys all the riparian rights of the grantor in the lake, in front of the land conveyed, and, as against the grantor, any land made by filling in the lake at the shore.

Reference to a former deed held sufficient to identify it.

Held, a certain reference in a deed sufficiently identifies the deed referred to.

Oral evidence to vary the effect of the deed.

Certain oral evidence *held* incompetent to vary the terms of a deed.

Appeal by plaintiffs, James N. Castle, William G. Robinson and Edward S. Brown, executors of the will of Martin Mower, deceased, from an order of the District Court of Washington County, W. C. Williston, J., made December 26, 1893, denying their motion for a new trial.

On November 12, 1857, Samuel Burkelo and wife and William H. Morse conveyed to Martin Mower a part of lot one (1) in block twenty eight (28) on the south side of Chestnut Street in Stillwater, sixty feet front on Lake St. Croix and running back westerly same width to v.57m.—19

within one hundred and fifty feet of Main Street; also Government lot four (4) in Section eighteen (18) in T. 32, R. 19, in Washington County, containing fifty one acres. This deed was recorded in the Registry of Deeds in Book I. page 515. Subsequently Stimson's alley thirty feet wide was laid out running north and south through lot one (1) west of and adjoining the part of the lot so conveyed to Mower. On November 14, 1868, Mower made a deed to Esaias Rheiner of a part of the lot described as follows:

"All that part of lot No. 1 of block 28 in the town now city of Stillwater, according to the recorded plat thereof, bounded as follows, to-wit: commencing at a point in the north line of said lot where the east line of Stimson's alley intersects said north line of said lot one (1), thence south along the east line of Stimson's alley sixty feet, thence east on a line parallel with Chestnut street to the shore of Lake St. Croix, thence northerly along said lake shore to the north line of said lot one (1), thence westerly along said north line to the place of beginning, being the same premises conveyed to said Martin Mower by Samuel Burkelo and wife by deed dated November 12, 1857, and recorded in the office of the Register of Deeds of said county in Book I of Deeds on page 515."

Esaias Rheiner died testate September 3, 1886. His will was proved and the defendants, H. B. Elder and the city of Stillwater, have succeeded to his rights and title to the property so conveyed to him. Since the deed to Rheiner the shore of the lot has been gradually extended eastward into the lake over a hundred feet by earth and refuse deposited there by various parties. Martin Mower died testate in 1890. His will was proved and letters testamentary were issued to the plaintiffs. They claim that Mower owned this made land, that he died seized thereof, that when he deeded to Rheiner they agreed where the shore line was and that it should circumscribe and limit the ground sold, that on the day the deed was made they met upon the ground and agreed that the line of the shore as it was at that time should be recognized between them and their heirs and grantees as the boundary on the east of the lot conveyed to Rheiner, and that Mower ever after during his life continued to claim the part outside of that old shore line. That after Mower's death Rheiner's devisees and their grantees and tenants claimed this made land and

that defendant Elder had made a wood and coal yard thereon. The plaintiffs prosecute this action to quiet the title of their testator and to determine the adverse claims of the defendants and to eject defendants from the land. The issues were tried May 26, 1893, before the court. The two deeds were received in evidence and it was admitted that the plaintiffs had succeeded to the title and rights of Mower and that the defendants had succeeded to the title and rights of Rheiner. Plaintiffs then offered to prove by competent oral evidence the conversation on the ground when the deed to Rheiner was made. Defendants objected and the court excluded the evidence and ordered judgment for defendants holding that the deed to Rheiner conveyed to him all of Mower's riparian rights. Plaintiffs moved for a new trial. Being denied they appeal.

Jas. N. Castle and C. B. Jack, for appellants.

When a deed contains a sufficient description of the land a reference to a former deed as conveying the same land is of no value. Such reference has never been exalted even to the dignity of throwing light upon a patent ambiguity. *Cassidy v. Charlestown F. C. Sav. Bank*, 149 Mass. 325; *Lovejoy v. Lovett*, 124 Mass. 270; *Dow v. Whitney*, 147 Mass. 1; *Thayer v. Finton*, 108 N. Y. 394; *Bradish v. Yocum*, 130 Ill. 386; *Brown v. Heard*, 85 Me. 294.

The oral testimony should have been admitted. It was not only good as between the parties but bound the heirs and assigns of Rheiner as well. *Norton v. Pettibone*, 7 Conn. 319; *Deming v. Carrington*, 12 Conn. 1; *Hills v. Ludwick*, 46 Ohio St. 373.

Where such a boundary is, with reference to the subject matter, is a question of fact, and may be proven as any other fact. As indicating where such a boundary is, the admissions of a party owning up to such a line made while owning and being in possession are competent evidence. The claim of one party and the admissions by the other are all important and should be taken into consideration. *Opdyke v. Stephens*, 28 N. J. Law, 63; *Pike v. Hayes*, 14 N. H. 19; *Deming v. Carrington*, 12 Conn. 1; *Rutherford v. Tracy*, 48 Mo. 325; *Wynn v. Cory*, 48 Mo. 346; *Smith v. McKay*, 30 Ohio St. 409; *Wood v. Foster*, 8 Allen, 24; *Eastman v. St. Anthony Falls W. P. Co.*, 43 Minn. 60.

Clapp & Macartney, for respondents.

The last clause in the description given in the deed from Mower to Rheiner shows that it was Mower's intention to convey to Rheiner all that part of this lot which he got by the deed from Burkelo and Morse. The court below adopted this view and did not go farther into the case.

In the construction of deeds where another deed or a map is referred to for further description, such other deed or map is considered as incorporated into the deed in which such reference is made. *Vance v. Fore*, 24 Cal. 435; *Hudson v. Irwin*, 50 Cal. 450; *Rutherford v. Tracy*, 48 Mo. 325; *Foss v. Crisp*, 20 Pick. 121; *Hopkins v. Smith*, 111 Mass. 176; *Flagg v. Bean*, 25 N. H. 49; *Bent v. Rogers*, 137 Mass. 192; *Wuesthoff v. Seymour*, 22 N. J. Eq. 66.

The description in the deed to Rheiner is complete, needs no parol evidence to explain it and is sufficient to convey all of the lot that Mower owned; *Hathaway v. Wilson*, 123 Mass. 359; *State ex rel. v. Hudson Tunnel R. Co.*, 38 N. J. Law, 548; *Child v. Starr*, 4 Hill, 369; *Halsey v. McCormick*, 13 N. Y. 296; *Yates v. Van De Bogert*, 56 N. Y. 526.

CANTY, J. Plaintiffs' testate, Martin Mower, was grantee in a deed dated November 12, 1857, made by Burkelo and Morse, recorded in Book 1 of Deeds, pages 515 and 516, in the office of register of deeds of Washington county, and conveying to Mower a part of a city lot in Stillwater, which, for the purposes of this case, may be described as bounded on the east by Lake St. Croix, on the west by Stimpsons alley, on the north by Chestnut street, and on the south by a line drawn parallel to, and sixty feet south of, that street, and conveying, also, a government tract of land some twenty miles from Stillwater. On November 14, 1868, Martin Mower made a deed to Rheiner, the description in which called for all the boundaries of this same part of this city lot, except that the south line ran to the shore of Lake St. Croix; thence north, along said lake shore, to the north line of the lot, to, and thence west along, Chestnut street, etc.; adding that it was the same premises conveyed to Mower by Burkelo by deed dated November 12, 1857, and recorded in said office in said book and page of deeds.

The lake in front of this lot has for many years past been used as a dumping ground for waste and garbage, and has been gradually filled in, so that the lake shore is now from 100 to 200 feet further out than it was when the lot was platted, in 1848, and this is an action of ejectment, brought by plaintiffs, to recover the land made in front of this lot by so filling out into the lake.

On the trial, plaintiffs offered to prove that at the time of making the last deed the old shore line was pointed out by Mower to Rheiner; and it was orally agreed that it should be the boundary line of the land to be sold to Rheiner, and that afterwards they again agreed to recognize this as the boundary line, and that Mower had and kept possession of all outside of this line until Rheiner's death, and that since that time the defendants, holding under Rheiner, have taken possession of all of this land up to the lake. The offer was refused. At the close of the trial judgment was ordered for defendants; and, from an order denying a motion for a new trial, plaintiffs appeal.

The plaintiffs did not seek equitable relief, in having the deed to Rheiner reformed. Their offer was an attempt to contradict the terms of the deed by oral evidence, and was properly refused.

The description in the deed to Rheiner, even without the aid of the reference to the other deed, was sufficient to convey all the riparian rights along the shore of the lake. "Where a party conveys a parcel of land bounded by water, it will never be presumed that he reserves to himself proprietary rights in front of the land conveyed. The intention to do so must clearly appear from the conveyance; and the mere fact that the boundary of the lot conveyed is indicated by a line on the plat will not limit the grant to the lines on the plat, or operate to reserve to the grantor proprietary rights in front of the lot." *Gilbert v. Emerson*, 55 Minn. 254, (56 N. W. 818,) citing *Watson v. Peters*, 26 Mich. 508. But in this case there was not even a line on the shore to limit the grantee's rights. But, if necessary, this deed was aided by the reference to the deed to Mower. While that deed conveyed two tracts, it was plain the parties intended to refer to this one only. It is also true that the reference was to a deed made by Burkelo, while the deed to Mower was made by both Burkelo and Morse; but there were clearly sufficient other data given in the reference to identify it as the first-named deed. The date of the deed, grantee, general description of

the premises, and book and page where the deed was recorded, were all correctly stated, which was sufficient.

It is not necessary to decide, as between these parties and the state, which would be entitled to the land in dispute, if the state claimed it. As between the plaintiffs and defendants, it is appurtenant to the land of Rheiner, as a part of his riparian rights, and plaintiffs have no right to it.

The order appealed from should be affirmed. So ordered.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 197.)

Application for reargument denied June 5, 1894.

ANTHONY KELLY *et al.* vs. MINNEAPOLIS CITY *et al.*

Submitted on briefs May 4, 1894. Affirmed May 15, 1894.

No. 8839.

Damages for change of grade of a street.

Where the city council of the city of Minneapolis changed the grade of a street (laid out before the railroad right of way was acquired) so that the street should cross over the railroad tracks on a bridge with approaches instead of crossing such tracks on a grade crossing, *held*, that in such case the charters of the St. P., M. & M. Ry. Co. and the M. & St. L. Ry. Co. do not impose on such companies the obligation of paying the damages to the owners of permanent buildings abutting on such approaches, caused by such change of grade, but that the statute creating liability for such damages imposes it on the property benefited by such change of grade.

A contract construed.

A certain contract of settlement between said city and said railroad companies construed, and *held*, that while the city, as between it and the railroad companies, assumed the liability for such damages, this did not relieve the property benefited from liability for the same.

Minneapolis city charter construed.

Held, the provisions of the city charter, giving the city council a right, after all claims for such damages are filed, to reconsider the vote by which it ordered the street grade to be changed, is a privilege to be exercised by the city council, and the owners of the property to be

taxed to pay such damages cannot, at least under the circumstances of this case, complain that the city council has put it out of its power to reconsider such vote before the time when it might do so arrives.

Subject of an act expressed in its title.

Held, Sp. Laws 1885, ch. 5, creating liability for such damages, and providing for a special tax or assessment on property benefited to pay the same, is not unconstitutional because the subject thereof is not properly expressed in its title.

Constitutional law.

Held, the provisions of such act providing for such special assessment on the property benefited are not unconstitutional because they do not give the owners of such property a right to be heard as to who shall be appointed assessors, or a right to appeal from such appointment.

Injunction to restrain special assessment proceedings.

Held, such property owners cannot restrain by injunction the proceedings to assess such special tax for benefits, on the ground of irregularities in the assessment proceedings, and that the right given by statute to defend in the proceedings to obtain the tax judgment, and the right to review such tax judgment in this court, give such owners an adequate remedy.

Appeal by plaintiffs, Anthony Kelly, Joel B. Bassett, John C. Beno, William H. Holt and Martin Buerfening, from an order of the District Court of Hennepin County, *Charles B. Elliott, J.*, made March 17, 1894, denying their motion for a new trial.

Action to restrain the defendants, the City of Minneapolis and Charles F. Haney, City Clerk, from proceeding with an assessment upon plaintiffs' property to pay damages awarded to certain other parties for change in the grade of Fifth street north in that city. After trial the court made findings and ordered judgment for defendants. Plaintiffs moved for a new trial. Being denied they appeal.

Kitchel, Cohen & Shaw, for appellants.

David F. Simpson and L. A. Dunn, for respondents.

CANTY, J. This is an appeal from an order denying plaintiffs' motion for a new trial in an action brought to enjoin the city of Minneapolis from assessing and collecting a special assessment of taxes on the property of the plaintiffs for benefits to their property in changing the grade of Fifth street north in said city, where it approaches and crosses over the tracks of the Great Northern Rail-

way Company (formerly St. Paul, Minneapolis & Manitoba Railway Company) and the Minneapolis & St. Louis Railway Company. This street was laid out as a public street before these railway companies acquired their rights of way. Their charters each provide, in substance, that the railway company shall have the right to construct its tracks across any such street, but that it shall restore the street to such condition and state of repair as not to impair or interfere with its free and proper use. This and other parallel streets crossed these tracks formerly on grade, and the city instituted mandamus proceedings to compel these companies to lower their tracks, and carry these streets over them. The construction of these charter provisions and the history of these proceedings may be found in the cases of *State ex rel. v. St. Paul, M. & M. Ry. Co.*, 35 Minn. 131, (28 N. W. 3;) *Id.*, 38 Minn. 246, (36 N. W. 870;) and *State ex rel. v. Minneapolis & St. L. Ry. Co.*, 39 Minn. 219, (39 N. W. 153.) But after the last of these cases was decided, and while it was pending in the United States Supreme Court on writ of error, it was stipulated by all the parties to it that such writ should be dismissed, and the final judgment in the District Court in that proceeding should be modified so that the tracks should be lowered less, and the grade of the street at the crossings and approaches accordingly raised more, and the approaches made consequently longer. The city further stipulated that it "assumes all liabilities for damages to the property of adjoining owners under the provisions of its charter, by reason of the change of the grade" in the streets "made necessary by the building of the approaches to the bridges on said streets, the same as though the said city were itself doing the actual work of constructing said approaches in accordance with said change of grade." The final judgment was modified pursuant to this stipulation, and the railroad companies proceeded accordingly, lowered their tracks, and built the bridges over them, and the approaches to these bridges at each end of the same. These approaches on Fifth street were partly filled in prior to September 1, 1891, when the city council voted to change the grade of Fifth street to the grade stipulated, and the approaches were afterwards completed by the railroad companies to conform to this grade. By an amendment, Sp. Laws 1885, ch. 5, to the city charter it is provided that when any permanent building has been constructed,

abutting on any street, after the grade has been once established, and the city council afterwards votes to change such grade, the owner of such building may, within twenty days thereafter, file objections stating his claim for damages; that unless the city council, within a certain time thereafter, reconsiders its vote, it shall appoint five freeholders to ascertain the amount of damages to such buildings, caused by reason of such change of grade, and award compensation therefor, and also assess the amount of such compensation upon the property to be benefited by such change of grade, and report all of the same to the city council, who may confirm the same, or refer it back to the same or another commission.

Such claims were filed for the change in grade of Fifth street, and such a commission was appointed. They assessed the damages to the permanent buildings thus damaged in the sum of \$20,000 in the aggregate, and awarded that amount as compensation to the owners of such buildings, and assessed or levied the amount so awarded against the lands and premises of these plaintiffs and others as benefits which they would receive by such change in grade, and hence this suit.

1. On the authority of *State ex rel. v. St. Paul, M. & M. Ry. Co.*, 35 Minn. 131, (28 N. W. 3,) appellants claim that the obligation to pay these damages rested on the railway companies. That case does not so hold. It holds that it was their duty to restore the crossing, and where, to accomplish this, it was necessary to build approaches, it was their duty to build them; and if, in the prosecution of the work, it became necessary to encroach upon private property, that they had the power of eminent domain, and should, at their own expense, acquire the rights necessary in order to restore the crossing.

Neither are the cases of *Robinson v. Great Northern Ry. Co.*, 48 Minn. 445, (51 N. W. 384,) and *Parker v. Truesdale*, 54 Minn. 241, (55 N. W. 901,) decisive of the question of the liability of the property benefited to pay the damages here awarded, as claimed by respondent, and held by the court below. In those cases the owners of property abutting on the approaches brought suit against the railroad companies for damages resulting from the change of grade. As to those cases, it is only necessary to suggest that the right to damages for a change of the grade of a street is purely a creature

of statute, and the mode of procedure provided by the statute for the recovery of the damages is exclusive. The railroad company, in doing the work of making the change of grade, was acting for the city, and under its authority and rights. Then it necessarily follows that, if such abutting owner could not maintain a suit against the city for damages, he could not against the railroad company. He could only follow the exclusive remedy given him by the statute. But these plaintiffs are not in that position. They do not stand upon the statute for their rights, while repudiating it for their remedy; they do not stand upon or claim under this statute at all.

We are of the opinion that the railroad companies were not primarily liable for the damages to abutting owners resulting from the change of grade of the street. The right to such damages is one that did not exist when the railroad charters were granted. Then the obligation to pay such damages was not a charter obligation. Whether or not the legislature could, since it granted the charters, and the companies accepted and acted upon them, have imposed this obligation on the companies, it is not necessary to consider. It is sufficient to say that the legislature has not imposed it on the companies, but on the property benefited.

It is true that the court and the city, if they had both so decided, could have compelled the companies to lower their tracks so low as to run under the street without any change of the street grade. But the object to be attained was not the preservation of the then existing street grade, or the exemption of these plaintiffs from liability for these statutory damages, but the restoration of the street, not to as good a condition as if the railroads did not run there, but to such a condition as was reasonable and proper, under all the circumstances,—to such a condition as not “to interfere with its free and proper use.” The city and the court decided what this reasonable and proper condition was to which the street should be restored. It is immaterial whether one or the other, or both, ultimately so decided. As far as these plaintiffs are concerned, they are conclusively bound by the result, and cannot be heard to say that there was no public necessity for the change of grade. If an incident of that result is to throw these statutory damages upon them, that is their misfortune.

2. It is also claimed that the city assumed the liability for these damages in its contract of settlement with the railroad companies, and that, therefore, it has become a liability of the city at large, and the damages should be paid out of the general funds. If the railroad companies were never liable for these damages, the contract of the city can hardly be construed as anything more than a contract to ~~save~~ the companies harmless. The city is the agent of, and represents, its wards, districts, and inhabitants in such public matters, and a contract by it, assuming their obligations, cannot be construed as a contract assuming the obligations of third parties, which, as between them and the city, relieves them from liability.

3. It is further claimed by appellants that this special assessment upon their property is void because the city council had put itself in a position where it had no opportunity to reconsider its vote when the time to file claims for damages had expired. The charter provides that the council may at that time reconsider its vote if, from the amount of damages claimed, it deems it unwise to make the change of grade. This right to rescind the proceedings is in the nature of a privilege to be exercised by the city council. The statute does not say that the work of grading shall not be commenced before the time to rescind expires, and it is in the discretion of the council how far it will proceed before the time to reconsider arrives. Whether or not the change is apparently unwise, and the damages likely to be so great and oppressive to those assessed to pay them as to make it an abuse of discretion for the council to proceed until the claims for damages have all been filed, and as to whether or not, in such a case, the court would grant relief, and as to whether or not the application should be made promptly before expense is incurred in carrying out the work, are all questions which it is not necessary here to consider. Neither the agreement with the railroad companies nor the prosecution of the work before the time to reconsider arrived destroys the validity of the assessment proceedings.

4. The charter of Minneapolis, ch. 8, § 9, provides that bridges crossing railroad tracks and the approaches thereto, when not chargeable to the railway companies, shall be built and maintained by the city as a general city charge. The appellants cite this as showing that these damages are a general city charge. Other parts of this section provide that the grading of streets shall, except as above provided, be a

ward charge. The section applies merely to the grading of streets and the keeping of them in repair, and not to the establishing of grades, or the changing of grades once established, or the payment of damages therefor, which is all provided for by Sp. Laws 1885, ch. 5, amending section 2 of this chapter 8.

5. Appellants claim that said chapter 5, Sp. Laws 1885, is unconstitutional because the subject of the act is not expressed in the title. The title to the act is "An act amending section 2 of chapter 8 of the charter of the city of Minneapolis." The title is sufficient. *State ex rel. v. Madson*, 43 Minn. 438, (45 N. W. 856;) *Willis v. Mabon*, 48 Minn. 140, (50 N. W. 1110.)

6. Appellants claim that the statute authorizing these assessments is unconstitutional, because the parties whose property is assessed have no opportunity to be heard as to who shall be appointed on the assessing commission, and no appeal is allowed in which a new commission may be appointed by the court after hearing. It is well settled that, as against the state, property owners have no such constitutional rights, whether the assessment is of some regular tax for general purposes upon the regular tax districts, or of some special tax for a special purpose upon the district specially benefited. *Hennepin Co. v. Bartleson*, 37 Minn. 343, (34 N. W. 222;) *Carpenter v. City of St. Paul*, 23 Minn. 232; *State ex rel. v. District Court of Ramsey Co.*, 33 Minn. 295, (23 N. W. 222;) *Rogers v. City of St. Paul*, 22 Minn. 494.

7. Appellants further claim that the tax districts designated by the commissioners are too small; that a large area of the city was benefited by, and should be assessed for, these improvements; that the boundaries of the district are arbitrarily fixed; and that property within the district has been omitted which should be assessed. It may be well to remark that the size and shape of the tax districts might properly have been influenced, to some extent, by the fact that similar improvements were at the same time being made on Third and Fourth streets, and were by the mandamus proceedings provided for on Seventh street, all of which, as well as the improvements on this street, will connect North Minneapolis with the southern part of the city.

But injunction will not lie to restrain tax proceedings when there is an adequate remedy provided by the statute. It has been held

that *certiorari* will not lie to the board making such an assessment to review such errors; that the only remedies for reviewing the acts of the assessing board are the right given to defend in the proceedings to obtain the tax judgment, and the remedies allowed for reviewing that tax judgment in this court. *State ex rel. v. Board of Public Works*, 27 Minn. 442, (8 N. W. 161.)

If the assessment proceedings cannot, prior to the final determination and entry of the tax judgment, be reviewed for such errors by the direct proceeding of *certiorari*, how can such proceedings for such errors be attacked collaterally by injunction? The other assignments of error have no merit.

This disposes of the case, and the order of the court below should be affirmed. So ordered.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 304.)

GRESHAM B. WARD vs. J. P. JOHNSON *et al.*

57	301
63	13

Argued May 18, 1894. Reversed May 24, 1894.

No. 8851.

Evidence sufficient to submit the question to the jury.

Evidence considered, and *held* to make a case for the jury on the question whether the purchaser of a promissory note made the purchase with notice of facts claimed by the makers as a defense.

Appeal by defendant, J. P. Johnson, from an order of the District Court of Douglas County, *D. B. Searle, J.*, made December 20, 1893, denying his motion for a new trial.

On June 16, 1890, the defendant Johnson and fourteen others, farmers residing near McIntosh, bought an imported stallion of Thompson & Cowan and in part payment made their joint and several promissory note for \$750 and interest payable to Thompson & Cowan or order on November 1, 1892. This note was delivered to the payees and was sold by them July 7, 1890, to the plaintiff,

Gresham B. Ward, who brought this action thereon against Johnson and others. Johnson alone answered claiming that he signed it on Sunday, June 15, 1890, and that the date was subsequently altered to June 16, 1890, without his knowledge or consent. He further claimed that the note was obtained by certain false and fraudulent statements set forth in the answer and that it was not to be delivered or of force unless twenty solvent persons signed it. He further claimed that plaintiff was not a *bona fide* purchaser of the note, but had knowledge and notice of these defenses when he took it. At the trial plaintiff introduced the note in evidence and rested. Johnson was a witness in his own behalf. The Judge submitted the question of the alteration of the date to the jury but withdrew all others and directed them that if they found no alteration, then to return a verdict for plaintiff for the amount of the note with interest. Defendant Johnson excepted. Plaintiff had a verdict. A motion was made for a new trial and denied. Defendant appeals. The discussion here was on the evidence, whether it was such as to require the Judge to submit to the jury the question of notice to plaintiff of the defenses, when he purchased the note.

H. Steenerson, for appellant.

Jenkins & Treat, for respondent.

GILFILLAN, C. J. The action is on a joint and several promissory note indorsed to plaintiff. The defenses are: First, that the note was, after signing by defendant, fraudulently altered; that it was signed by defendant upon the understanding between him and the payees that it was not to take effect until certain other parties should sign it; that the payees were to procure such other parties to sign, and it was left with the payees for that purpose; and that the signatures of such other parties were never procured.

The trial court submitted only the first of these defenses to the jury, and the plaintiff had a verdict.

The court withdrew the second defense from the jury, on the ground that there was nothing indicating that the plaintiff, when he purchased, had notice of any facts which would constitute a defense between the original parties. There was evidence tending to prove the facts alleged in that defense. On the other hand, the plaintiff showed beyond question that he purchased before maturity, and for

a valuable consideration; and there remained the question, was there a case for the jury on the matter of notice to him, at the time of his purchase, of the facts showing the note had never been completed?

The note was dated June 16th and transferred to plaintiff July 7th, 1890. The testimony of one of the payees tended to show (not very clearly, perhaps) that, within a very few days after the transfer, he took the note for the purpose of endeavoring to get, and did endeavor to get, the signatures of the other parties who were to sign, and had not signed it. Now, if the jury had found, as they might have done from that testimony, that such payee got the note from plaintiff, they would have been justified in the inference that the plaintiff knew it was for the purpose of having it completed by the signatures of those who were to but had not signed it; and, from the transaction occurring so very soon after the transfer to him, they might, in the absence of any explanation, conclude he knew of the incompleteness of the note when transferred to him.

There was a case for the jury on the question, and it was error to withdraw what we have designated the second defense from the jury.

Order reversed.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 189.)

ADOLPH H. SCHLITZ *vs.* PABST BREWING Co. *et al.*

Submitted on briefs May 10, 1894. Affirmed May 24, 1894.

No. 8890.

57	303
81	179

Servant injured while driving master's defective wagon.

Where the dangerous condition of an instrumentality furnished a servant to do his work is known to both the master and servant, and the latter, upon his objecting to continue its use, is induced to do so for a short time by the request of the master, for his own convenience and purposes, and his promise that at the end of such time the use shall be discontinued, the servant does not during such time assume the risk

incident to such dangerous condition, unless it be so imminently and immediately dangerous that a man of ordinary prudence would have refused longer to use it.

Appeal by defendants, Pabst Brewing Co. and Jos. Schlitz Brewing Co., two corporations, from a judgment of the District Court of St. Louis County, *J. D. Ensign, J.*, entered against them March 23, 1894, for \$2,081.26.

The defendants manufacture malt liquors at Milwaukee, Wis. and have a joint agency for its sale at Duluth. They employed the plaintiff, Adolph H. Schlitz to drive a delivery wagon there and deliver beer at saloons. On July 4, 1891, he was told by Pierce the general agent in charge at the Duluth agency to use a certain wagon. He objected to using it saying, that the body of the wagon was so low that in turning the front wheels could not go under it and that in attempting to turn a short corner it was liable to upset. Pierce said to him in reply that they were short of wagons for that day and that he must use it for the rush of July 4th and that on the following day plaintiff should have another and safe wagon. Schlitz consented to and did use it until six o'clock in the afternoon, when in climbing up onto it the team made a short turn and upset the wagon and seriously injured him. He brought this action against the two corporations to recover damages for his injuries. He proved that the wagon when new allowed the front wheels to go under the body in turning, but that by long use and overloading the springs had flattened down and allowed the body of the wagon to settle, so that the wheels would no longer go under it. He had a verdict for \$1,850. Judgment was entered thereon and defendants appeal.

Cash Williams & Chester, for appellants.

We are referred to no adjudicated case which upholds the liability of a party under circumstances like those presented by the evidence here. A rule imposing liability in this case would be far reaching and would extend it to many of the vocations of life for which it was never intended. The rule of the master's liability was designed for the benefit of employes engaged in work where machinery and materials are used, of which they can have but little knowledge, and not for those engaged in ordinary labor, which only requires the use of implements with which they are entirely familiar. *Corcoran v. Mil-*

Waukegan G. L. Co., 81 Wis. 191; *Marsh v. Chickering*, 101 N. Y. 396; *Priestley v. Fowler*, 3 M. & W. 1; *Fort Wayne J. & S. R. Co. v. Gildersleeve*, 33 Mich. 133; *Williams v. Clough*, 3 H. & N. 258.

John Jenswold, Jr., for respondent.

Plaintiff was peremptorily ordered to use this wagon and he had no choice in the matter, but had to use it because of the emergency of the defendants' business on that day. Under the circumstances plaintiff did not assume the risk. *Greene v. Minneapolis & St. L. Ry. Co.*, 31 Minn. 248; *Lyberg v. Northern Pac. R. Co.*, 39 Minn. 15; *Gibson v. Minneapolis, St. P. & S. Ste. M. Ry. Co.*, 55 Minn. 177; *Parody v. Chicago, M. & St. P. R. Co.*, 15 Fed. Rep. 205; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 26 Fed. Rep. 897; *Pieart v. Chicago, R. I. & P. Ry. Co.*, 82 Ia. 148; *Roux v. Blodgett & D. L. Co.*, 85 Mich. 519.

If it is the law as claimed by defendants, that as wagons are instrumentalities commonly made use of no negligence can be charged in furnishing one that is not reasonably safe, this court would never have decided *Hefferan v. Northern Pac. R. Co.*, 45 Minn. 471, as it did. *Rawley v. Colliau*, 90 Mich. 31; *Steen v. St. Paul & D. R. Co.*, 37 Minn. 310; *Brown v. Gilchrist*, 80 Mich. 56; *Schubert v. J. R. Clark Co.*, 49 Minn. 331.

GILFILLAN, C. J. Plaintiff, a driver of defendants employed to drive a delivery wagon, was, while so employed, injured, as he claims, through a dangerous defect in the wagon he was using. The evidence was such as to justify a finding that the wagon was defective to such a degree as to be dangerous to the driver, and that the injury to plaintiff was in consequence of its dangerous condition.

Both parties, employer and employé, knew equally well the dangerous condition of the wagon, so that, under ordinary circumstances, it would be a case of the assumption of risk by the employé continuing to use it.

But it is a well-settled rule that where the servant, though he knows the dangerous condition of the instrumentality furnished him, is induced to continue its use by the request of the master, and his promise to remedy the defect after complaint made to him by the

servant, he may continue such use for a reasonable time for the defect to be remedied without assuming the risk incident to its dangerous condition, unless it be so imminently and immediately dangerous that a man of ordinary prudence would have refused longer to use it. *Greene v. Minneapolis & St. L. Ry. Co.*, 31 Minn. 248, (17 N. W. 378.)

The most logical reason for the rule is that, under such circumstances, it must be taken as understood between them that the continued use in the then condition of the instrumentality, being for the convenience and purposes of the master, is to be at his risk, and not at the risk of the servant.

The cases in which the rule has been applied have been cases where there was a promise on the part of the master to remedy the defect. But we can see no difference in principle between such cases and those where, upon the servant's objecting to continue the use, the master, for his own convenience and purposes, induces the servant to continue it for a short time, upon the promise that the use shall be discontinued at the end of such time. What, for instance, could be the difference on the matter of assuming the risk between a promise to remedy the defects of this particular wagon and a promise to furnish another without such defects? We can see none.

Of course, though in such a case the risk incident to the dangerous condition of the instrumentality is on the master, if the servant, by his own negligence in the manner of using it, bring injury on himself the master will not be liable.

Whether that was this case, and whether the wagon was so imminently and immediately dangerous that an ordinarily prudent man would refuse to use it longer, was for the jury.

Judgment affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 188.)

GEORGE E. YOUNG *vs.* ERNEST OTTO.

Argued May 8, 1894. Affirmed May 24, 1894.

No. 8798.

Misconduct of jurors who are subsequently excluded from the jury.

Where misconduct of two jurors, and of the party with those two, was discovered, and brought to the attention of the court during the trial, and by consent the two jurors were excused, and the trial proceeded with the other ten, such misconduct is not ground for granting a new trial.

Findings sustained by the evidence.

Evidence *held* sufficient to sustain findings of fact.

Error cured.

Error in excluding a witness' answer to a question *held* cured by subsequently permitting the answer.

Stating the purpose of evidence offered.

Where but one purpose is apparent from a question to a witness, and for that purpose the question is incompetent, and on that ground it is objected to, and the objection sustained, the party asking it cannot be permitted to claim it was competent for some other purpose, unless he stated that purpose before the court ruled upon the objection.

Test of mental capacity.

Where a party, in anticipation of death, and with a view to that event, makes final disposition of his property, whether entirely by will or entirely by *ante mortem* transfers, or by both, the test of mental capacity to do so is the same, to wit, that applicable in case of wills.

Appeal by defendant, Ernest Otto, from an order of the District Court of Wright County, *Seagrave Smith, J.*, made November 11, 1893, denying his motion for a new trial.

On January 10, 1893, William Otto, a farmer of Wright county, died of consumption at Minneapolis where he had gone for medical treatment. The plaintiff, George E. Young, was on February 16, 1893, duly appointed by the Probate Court of Wright county administrator of his estate and as such on April 14, 1893, brought this action of replevin against Ernest Otto, brother of deceased, to recover possession of three horses, four cows, young cattle, hogs, grain, hay, farm machinery and other property described, or \$1,178.70 the value thereof in case possession could not be obtained and \$500

damages for its detention. The defendant answered claiming title to the property under two bills of sale made by deceased, one on December 30, 1892, and the other on January 2, 1893. Plaintiff claimed that the two bills of sale were made by deceased while he was mentally unsound and incapable of contracting and were procured by undue influence exercised over him by the defendant and his sister, Anna Kubon, and were without consideration. At the time of executing the last bill of sale he also executed a will by which he devised two thirds of his real estate to his father and mother and the other third to his wife with whom he was in discord. He left no children. Specific questions of fact involved in the issues were framed and submitted to a jury. During the trial on June 15, 1893, two of the jurors went out in the evening with the plaintiff, the widow, her brother and his wife, and others on Buffalo Lake in a boat, fishing. The matter was reported to the court next morning and by consent the two jurors were excused and the trial proceeded with the remaining ten. Martha Kubon, a witness for defendant, was asked by him to state what was the mental condition of deceased his capacity to understand when the bills of sale were made. This was objected to by plaintiff and excluded. After she had subsequently stated incidents in his conduct and demeanor observed by her, she was permitted to answer. This ruling excluding her answer at the first is defendant's fifth assignment of error. The defendant was a witness in his own behalf and was asked by his counsel to state what was said, when the first bill of sale was executed, about a debt of \$400 which he and the deceased owed jointly. This was objected to as incompetent, the other party being dead. The objection was sustained. Defendant excepted to the ruling. His counsel then stated that he offered the evidence on the question of the competency of the deceased, but nothing further was said on that point and the matter was dropped. This is defendant's sixth assignment of error. The jury in answer to the specific questions of fact submitted to them found that William Otto had not, when he executed the bills of sale, sufficient mental capacity to execute them and that they were procured by undue influence of the defendant over him. The court made findings embracing this verdict and directed judgment for the plaintiff. Defendant moved for a new trial. Being denied he appeals.

W. E. Culkin, C. A. Ebert and Henry Ebert, for appellant.

The prevailing plaintiff Young, the widow Mary Otto, and two important witnesses for them went on Lake Buffalo in a small boat with two jurors at night, pending the trial. This misconduct was caused by the prevailing party. He interfered with the orderly administration of justice and should not be permitted to prevail. Our statute provides for new trials for misconduct of prevailing party. Here prevailing party has not explained his misconduct. *Kochler v. Cleary*, 23 Minn. 325.

A witness whether professional or not may state the opinion formed by him upon his own knowledge of facts as to vendor's state of mind. The fact that the witness, Martha Kubon, was allowed afterwards to testify to the mental condition of deceased on December 30 and January 2, does not cure the error in excluding the previous offer. Defendant had a right to show his condition before and after the transaction. *Woodcock v. Woodcock*, 31 Minn. 217; *In re Pinney's Will*, 27 Minn. 280.

The court erred in sustaining the objection of plaintiff to the question asked of Ernest Otto specified in the sixth assignment of error. When the capacity of vendor is attacked his declarations may be offered in evidence. *Howe v. Howe*, 99 Mass. 88; *Howell v. Howell*, 47 Ga. 492; *In re Pinney's Will*, 27 Minn. 280; *Woodcock v. Woodcock*, 36 Minn. 217.

This was no attempt to prove a contract. That was already in evidence and was under seal and imported a consideration. The only questions in issue were those of capacity and undue influence.

The charge to the jury as to the mental capacity of deceased to make a bill of sale is erroneous. The rule given may apply to capacity to make a will but not a mere bill of sale. It requires the very highest intelligence and under the rule stated no contract would stand. It is not the test of a valid contract.

James M. Burlingame, for respondent.

If any wrong occurred from the evening boat ride it was healed by dismissing the two jurymen at defendant's request.

The exclusion of the answer of Martha Kubon to the question as to William's mental condition, his capacity to understand, from the

time he came to Minneapolis up to the Saturday before he died, if error, was cured by finally receiving her testimony.

The court's refusal to allow Ernest Otto to state what was said between him and William as to the \$400 was objected to on the ground that William was dead. The court sustained the objection and the plaintiff excepted. Clearly the ruling of the court was right. After the matter had been thus decided counsel made the remark, "We offer that on the question of competency." The court and plaintiff's counsel waited for him to ask his question again after announcing this ground, but he did not.

Appellant concedes that the rule laid down by the court in the charge applies to a will but contends that it does not apply to a bill of sale. But let it be remembered that the court was talking of these bills, of sale and this will and that the evidence tended to show that these three papers were a part of one scheme to make final disposition of his property in view of death and to take everything from the widow.

GILFILLAN, C. J. It being conceded that during the trial the matter of the alleged misconduct of two of the jurors, and of the plaintiff in connection with them, was brought to the attention of the court, and then by consent the two jurors were excused, and the trial proceeded with the other ten, the defendant must be held to have waived his right to complain of the misconduct. He could not be permitted to experiment with the jury of ten jurors, and, failing of a verdict from them, insist upon a trial by another jury.

On the special findings of the jury that William Otto had not sufficient mental capacity to execute the bills of sale, the plaintiff is entitled to judgment. The general verdict necessarily follows upon those findings; and, if there was no error affecting them, we need not consider how it was with the issue as to undue influence. And the evidence on the issues thus found was so diverse and conflicting as to make it peculiarly a case in which the finding of the jury either way must be held conclusive.

The fourth and seventh assignments of error affect only the issue of undue influence, and need not be considered.

The question referred to in the fifth assignment of error the court, subsequently, when the witness had more fully shown herself com-

petent to answer, permitted her to answer, so that, if there was error in first excluding the answer, it was cured.

The question to defendant when a witness in his own behalf, referred to in the sixth assignment of error, called for what was said on a particular occasion between him and William Otto, deceased, the other party to the contract in controversy. It was: "You may state what, if anything, was said between you as to this \$400." On the face of the question, its purpose, and it was the only purpose suggested by it, was to prove a declaration or admission of the deceased, for which purpose it was, under the statute, incompetent. It was objected to on that ground, and the court sustained the objection. It is not permitted a party to covertly mislead a trial court and the opposite party, and, if the defendant asked the question for a purpose not apparent from the question itself, he ought, as soon as it was objected to, and before it was ruled upon, to have stated such purpose. But the defendant waited until the court ruled on the question, and then said he offered it on the matter of William Otto's mental capacity. After that no objection was made, and he did not ask leave nor offer to renew the question, but went on with the examination as to mental capacity. There was no ruling of the court on the competency of the question on the matter of mental capacity, and we need not consider that question. For the purpose suggested by the question, it was incompetent.

As a test of capacity or want of capacity to execute the bill of sale in controversy, the court instructed the jury: "If you find from the evidence that he knew at the time he made this bill of sale, and realized, his relations to his family, his wife, the extent of his property which he had at that time, and the effect that this bill of sale would have in disposing of his property, and fully understood the effect of it, then he had a capacity that the law recognizes as sufficient to execute bills of sale of this character, but if he had not that, then he had not sufficient capacity to execute the bill of sale." This was excepted to.

This is conceded to be a proper test of capacity to execute a will. But it contains several elements not required in a test of capacity to execute an ordinary single contract. This is not the case, however, of an ordinary single contract. One bill of sale was executed December 30th, another January 2d, and at the latter date a will was

executed. It is apparent from the evidence that the three instruments disposed of all, except trifling and inconsiderable items, of William Otto's property; that all were executed when he expected to die in a short time, and in anticipation of death, and for the purpose of making a final disposition of his property with a view to that event. All are to be taken therefore as parts of one transaction, and having one purpose in view,—to make disposition of his property in anticipation of death. In such a case the test of capacity must be the same whether the party attempts to make disposition of his property entirely by will or entirely by *ante mortem* transfers, or by both. As applied to an attempt to make a disposition of his property in either of those ways, the test of capacity stated by the court is the proper one.

Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 199.)

EDWARD FITZGERALD *vs.* J. ROYAL McMURRAN.

Submitted on briefs May 9, 1894. Affirmed May 24, 1894.

No. 8743.

Finding of fact upon affidavits sustained.

A finding, on motion to vacate an attachment, that defendant, notwithstanding his absence from this state, was still a resident, sustained.

Appeal by plaintiff, Edward Fitzgerald, from an order of the District Court of Ramsey County, *John W. Willis, J.*, made November 18, 1893, vacating a writ of attachment.

Plaintiff commenced this action against defendant, J. Royal McMurren, upon his note for \$1,000 and interest dated December 22, 1892, due nine months thereafter. On affidavit that defendant was not a resident of the state plaintiff procured a writ of attachment under which the sheriff of Ramsey County on October 7, 1893, seized the defendant's real estate. The summons was served by

publication. On November 11, 1893, the defendant moved the court on affidavits showing him to be a resident of the state, temporarily absent on business, to vacate the attachment. The court granted the motion and plaintiff appeals.

Horton & Denegre, for appellant, cited *Lawson v. Adlard*, 46 Minn. 243; *Chase v. Ninth Nat. Bank*, 56 Pa. St. 355; *Ludlow v. Ramsey*, 11 Wall. 581; *Keller v. Carr*, 40 Minn. 428.

Jones & McMurran, for respondent, cited *Jones v. Swank*, 51 Minn. 285; *Keller v. Carr*, 40 Minn. 428; *Hurlbut v. Seeley*, 11 How. Pr. 507; *Savage v. Scott*, 45 Ia. 130; *Chariton County v. Moberly*, 59 Mo. 238.

GILFILLAN, C. J. An attachment was issued against defendant's property, on the ground that, as alleged, he was a nonresident. It was vacated upon affidavits from which the court below must have found that he was a resident. It is unnecessary to say more of the affidavits than that defendant was undoubtedly a resident up to January, 1893, and that from them the court might well conclude that at that time he left the state for a temporary business purpose, and without intending to abandon his residence here, and without intending to acquire or acquiring a residence elsewhere, and that, notwithstanding his absence, he continued a resident here.

Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 30 N. W. 190.)

LILLA J. CLEMENT *vs.* SEYMOUR W. BROWN.

Argued May 15, 1894. Reversed May 24, 1894.

No. 8818.

Exemplary damages for breach of promise of marriage.

In an action for breach of promise to marry, it was *held* not a case for exemplary damages, because, as disclosed by the record, the conduct of plaintiff was throughout their entire connection just as bad as that of defendant.

Appeal by defendant, Seymour W. Brown, from an order of the District Court of Winona County, *Chas. M. Start, J.*, made October 31, 1893, denying conditionally his motion for a new trial.

The plaintiff, Lilla J. Clement, brought this action to recover damages for breach of defendant's promise made at Minneapolis to marry her in the spring of 1893. Defendant denied that he made the promise and also pleaded in mitigation that plaintiff was formerly the wife of George E. Clement, a locomotive engineer. That plaintiff and defendant became intimate. The husband discovered the intimacy. To avoid prosecution defendant gave the husband \$900 and the wife his note for \$7,500 and interest due in two years thereafter. The wife soon after by consent obtained a divorce from her husband. Defendant then bought a house for plaintiff in Minneapolis where she has since resided and he has visited. On the trial the Judge charged the jury among other things that plaintiff would be entitled to exemplary damages, that is smart money, in case defendant's refusal to keep his alleged promise was without justification and the contract to marry was entered into by him with improper motives and with no intention of performing it. The jury returned a verdict for plaintiff and assessed her damages at \$13,042. Defendant moved for a new trial. The court ordered that it be granted unless plaintiff should consent that her recovery be reduced to \$7,000 and denying it if she did. She consented. The defendant appeals from the order.

Wm. Gale and Losey & Woodward, for appellant.

The jury were told by the court that plaintiff would be entitled to smart money in case defendant's refusal to perform was without

justification, and the contract to marry was entered into by him with improper motives and with no intention of performing it.

This assumes as law and unqualifiedly instructs the jury that if they find the facts supposed, they are bound to give the plaintiff smart money, ignoring the rule that the question of smart money is left in all cases to the discretion and good judgment of the jury itself.

The reduction of the verdict, on motion for new trial, to an amount which the court thought a sufficient measure of actual damages was not the appropriate remedy for this mistake. The jury's measure of actual damages might well have been much less than \$7,000.

There was not a scintilla of evidence in the case to support a finding that this promise, if made, was made with any improper motives or without intention of performing it.

W. F. Sawyer and Brown & Abbott, for respondent.

The only exception taken at the trial challenging any part of the charge, relating to exemplary damages, is in the following language: "The defendant excepts to that part of the charge relating to exemplary damages." That part embraced several distinct propositions of which, if any one was correct, the exception is unavailing. *Main v. Oien*, 47 Minn. 89.

The charge was correct. *Johnson v. Travis*, 33 Minn. 231.

The single fact that defendant denies that he ever made the promise is some evidence that he did not intend to perform it, and numerous instances are derivable from the record leading to the same conclusion.

GILFILLAN, C. J. We agree with the conclusion which the trial court seems to have reached on the motion for a new trial,—that this is not a case for the allowance of exemplary or punitive damages. As the words indicate, such damages may, in a proper case, be assessed against a defendant, in addition to the actual damages sustained by plaintiff, as a punishment for the oppressive, malicious, and wanton character of the wrong done to plaintiff. However reprehensible in morals the conduct of the defendant may have been,—however worthy of punishment,—it would be a travesty of

justice to punish him for the benefit of the plaintiff, who, through their entire connection, so far as disclosed by the record, was not a whit better than he. The whole history is one of those disgraceful transactions of which courts are sometimes obliged to take cognizance.

If a man knowingly engage himself to marry a woman of evil life and character, as one who has lived in adultery with him, and, without any other cause than her bad character, goes back on his promise, he must respond in whatever actual damages she sustains by his breach of promise, though, as bearing upon the amount of such damages, he may prove her character. But, in respect to damages imposed as a punishment, such a woman cannot stand in the same position as one who is pure and to whose conduct no exception can be taken. To permit her to do so would be too much like obliterating the distinction between virtue and vice, and would be an encouragement to disreputable adventures.

It was error for the court below to leave the matter of exemplary damages to the jury.

We are satisfied, as the court below was, that the verdict was, in part at least, made up of such damages. We wish that we could, as the court below endeavored to do, separate the actual from the exemplary damages included in the verdict, and so put an end to the case, and rid the courts of further consideration of it; but that is impossible.

Order reversed.

MITCHELL and BUCK, JJ., took no part in the decision.

(Opinion published 59 N. W. 198.)

JOHN MCLENNAN vs. MINNEAPOLIS AND NORTHERN ELEVATOR Co. et al.

Argued May 17, 1894. Affirmed May 24, 1894.

57	317
78	175
57	317
81	304

No. 8819.

Error without prejudice.

Certain error *held* to have been without prejudice.

Witness as to the market.

A farmer is presumed to know so that he can testify to the value of crops such as he raises and sells.

Evidence as to market values.

In an action for conversion of personal property, evidence of its value a short time before, say a week or ten days, there being nothing to suggest a change in value meantime, is sufficient.

Conversion, prior to demand and refusal.

The jury may find a conversion prior to the time of the demand and refusal if the evidence indicate an earlier date for the conversion in fact.

Principal and agent when the latter not liable for conversion.

An agent for a ballee of property is not liable for a conversion by his principal in which he does not actually participate.

Appeal by defendants, Minneapolis and Northern Elevator Company and Wynkoop Leman, from an order of the District Court of Polk County, *Frank Ives, J.*, made November 29, 1893, denying their motion for a new trial.

The defendant, Minneapolis and Northern Elevator Company is a corporation engaged in buying, storing and shipping grain at Angus. The other defendant, Wynkoop Leman, is its agent in charge of its grain house at that station. The plaintiff, John McLennan, is a farmer who in October, 1891, threshed his wheat and sent it to the station and delivered it to the company with directions to forward it by cars to S. S. Linton & Co. at Duluth for sale. Plaintiff claimed that he delivered to defendants 2,447 bushels and 45 pounds, that defendants sent forward only 2,251 bushels and he brought this action against the corporation and its agent to recover the value of the residue, 196 bushels and 45 pounds, which he claimed was converted by them. Plaintiff produced in evidence on the trial fifteen small paper cards having on them only a date and some figures. The agent Leman being called by plaintiff as a witness

under Laws 1893, ch. 105, testified that the figures were made by him and the cards delivered to the teamsters as they brought in the wheat, that the figures indicated the number of bushels and pounds brought by each. Plaintiff testified that he delivered two additional loads, the card for which was lost by the teamster. To prove the amount of wheat forwarded by defendants to S. S. Linton & Co. plaintiff was permitted to introduce in evidence the three reports made by that firm to him of the sale of three carloads of wheat, stating the number of bushels in each and the price at which it was sold. But defendants afterwards proved the shipping of these three carloads and the number of bushels in each car and the proof agreed with the reports of S. S. Linton & Co. as to amount of wheat shipped. The plaintiff testified that he was a farmer living in the vicinity of Angus and was then permitted to testify to the value of the wheat without otherwise showing that he knew the market. Plaintiff also testified that he ordered defendants to ship the wheat at once as delivered and that they claimed at the time that they had shipped all of it. He made a formal demand in January, 1892, for the unshipped wheat and was refused. The jury found a verdict for plaintiff against both defendants and assessed his damages at \$145. Defendants moved for a new trial but were refused and they appeal. The discussion here was on the evidence. There was no disagreement or discussion between counsel as to the law.

A. A. Miller, for appellants.

Edward George, for respondent.

GILFILLAN, C. J. The slips introduced in evidence (Exhibits A to M) were sufficiently explained to show that they represented the quantity of wheat in bushels and pounds delivered on the occasions on which they were issued, and they were therefore evidence.

Whether there were, in addition, two loads of wheat for which the slips had been lost, was a question for the jury.

The error in admitting the returns of Linton & Co. was cured by the defendants' own evidence, showing how much of the wheat it shipped to that firm; and it is demonstrable from the verdict that the jury could not have taken into account the prices in the returns, so that the error was without prejudice.

The plaintiff's testimony as to the value at Angus of the wheat

at the times of its delivery to defendants—October 17th, 19th, and 20th—was competent, and, especially as it was not contradicted, was sufficient. It must be assumed that a farmer raising and selling crops knows their market value.

The jury may find a conversion prior to the time of the demand and refusal, if there be evidence to indicate an earlier date for the conversion in fact. In this case it indicates a conversion as early as the date of the last shipment by defendant to Linton & Co.,—October 25th,—when it ought to have completed the shipment. Evidence of the value within so short a time before that as the 17th, 19th, and 20th, without anything to suggest a change in value, was evidence of value on the 25th.

But no conversion by Lemen was shown. He was merely the agent of the elevator company, and, as such, received for it the wheat. He was not responsible to the plaintiff for it, nor could he be held liable for its conversion by the company. He could be liable only for an actual conversion by him, or for actual participation in a conversion by the company, and there is no evidence of either.

The order must be reversed as to Lemen, and affirmed as to the other defendant.

Buck, J., absent, sick, took no part.

(Opinion published 59 N. W. 638.)

Petition for reargument denied June 35, 1894.

ALLEN J. MILLER vs. STATE BANK OF DULUTH.

Argued May 7, 1894. Reversed May 24, 1894.

No. 8803.

Principal and Agent.

An agent depositing money of his principal in his own name as agent,—thus, "A. J. Miller, Agent,"—cannot maintain an action for it in his own name after his agency ceases.

Appeal by defendant, the State Bank of Duluth, from an order of the District Court of St. Louis County, *Charles L. Lewis, J.*, made November 4, 1893, denying its motion for a new trial.

Simon Clark & Co. of Duluth were in grocery trade and became embarrassed and called a meeting of their principal creditors for March 11, 1893. The creditors after consultation orally agreed that the firm should go on, and that the plaintiff, Allen J. Miller, should be made agent of the firm and go into the store on a salary and assist to sell the goods and collect the demands, and that he should deposit the proceeds in bank until Simon Clark the senior member of the firm should return from Scotland. Plaintiff agreed to this and between that date and April 13, 1893, he received for the firm and deposited in the State Bank of Duluth \$6,077.44 to the credit of A. J. Miller agent. He checked out in the same time \$2,581.53. Clark returned and all the members of the firm made an assignment of their individual and firm property April 13, 1893, to R. F. Fitzgerald in trust for the equal benefit of all their creditors. The bank then claimed the equitable right to setoff against the money so deposited by plaintiff certain notes held and owned by it and made or indorsed by the firm of Simon Clark & Co. and falling due some before and some after the assignment, but exceeding in amount \$15,000 in the aggregate. To escape that question this action was brought for the \$3,495.91 in the name of the plaintiff, he claiming to have received the money and to have deposited it as trustee of an express trust for the creditors of the firm. A jury was waived and the court made findings and ordered judgment for plaintiff. The defendant moved for a new trial, being denied it appeals.

Cotton Dibell & Reynolds, for appellant.

It is unnecessary to discuss at length to whom the moneys received by Miller and by him deposited with the bank belonged. He was not the owner of it. It was derived from sales of merchandize belonging to Simon Clark & Co. and from the collection of accounts owing to them. Miller was their clerk on a salary. He was not a trustee nor was there any express trust. Simon Clark & Co. owned the merchandize and accounts and therefore owned the moneys derived from their sale and collection. Miller never owned the merchandize or the accounts. What was said and done at the meeting of the creditors held in March, 1893, did not invest Miller with title to the merchandize or accounts of Simon Clark &

Co. nor with the ownership of the money into which they were subsequently changed. After the voluntary assignment of Simon Clark & Co. this money did not belong to Miller or to Simon Clark & Co.

The bank claims the right to setoff the \$14,000 indebtedness of Simon Clark & Co. to it, against its indebtedness of \$3,495.91 to Simon Clark & Co. *Martin v. Pillsbury*, 23 Minn. 175.

Courts of equity in permitting setoffs against obligations accruing to insolvents will disregard the nominal parties and consider the real parties in interest and will setoff an obligation not yet due against a matured obligation. *Gallagher v. Germania Brewing Co.*, 53 Minn. 214; *Nashville Trust Co. v. Fourth Nat. Bank*, 91 Tenn. 336; *Carr v. Hamilton*, 129 U. S. 252; *Schuler v. Israel*, 120 U. S. 506.

Counsel contend that the allowance of the offset would operate as a preference of its claim over the claims of other creditors of Simon Clark & Co. A preference of one creditor over another is not objectionable except as forbidden by Laws 1881, ch. 148, and such preference can only be avoided by a direct action brought for that purpose under the provisions of that act, that is by an action brought by the assignee of the insolvents. *Smith v. Diedrick*, 30 Minn. 60; *Berry v. O'Connor*, 33 Minn. 29; *Mackellar v. Pillsbury*, 48 Minn. 396.

Nor was defendant estopped by anything he participated in at the meeting of creditors. As a result of such meeting Miller was employed on a salary to assist the firm of Simon Clark & Co. and as a part of the same transaction it was arranged that the money accruing from the sales of merchandize and from the collections of accounts should be deposited in the American Exchange Bank and in the State Bank of Duluth. This was done. It is not claimed that Miller in depositing the funds did otherwise than as directed. What he did in this respect was done with the consent of the creditors present at these meetings and with the consent of Simon Clark & Co. He has incurred no liability. One of the essential elements of an estoppel *in pais* is that the party seeking to urge the estoppel will be substantially prejudiced by not being permitted to assert it. *Caldwell v. Auger*, 4 Minn. 217; *Whitacre v. Culver*, 8 Minn. 133; v.57M.—21

County Com'rs v. Robinson, 16 Minn. 381; *Pence v. Arbuckle*, 22 Minn. 417; *Hawkins v. Methodist Church*, 23 Minn. 256.

Wm. A. Cant and Walter Ayers, for respondent.

The bank is estopped by having accepted and dealt with the funds in question as funds of the plaintiff and in his name. These moneys were placed in Miller's control with the consent of the insolvents, and of the creditors including the bank to prevent preferences and he deposited them and the bank received them from him and opened an account with him. It honored his checks. The defendant thereby recognized Miller's ownership and the agreement between him and the creditors and is now estopped to question the same. *Keyser v. Simmons*, 16 Fla. 268.

A person depositing money with a bank, no matter in what capacity, is entitled to have the same repaid to him upon demand. *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 333; *Jackson v. Bank of United States*, 10 Pa. St. 61; *First Nat. Bank v. Mason*, 95 Pa. St. 113; *Lund v. Seaman's Bank*, 37 Barb. 129; *Sinclair v. Murphy*, 14 Mich. 392.

Defendant is estopped to deny that Miller is the real party in interest. Of all the creditors interested in this matter none seeks to disturb the agreement or question Miller's right save the bank. In so doing it is guilty of a culpable breach of faith, and in the event of success it would secure a pecuniary advantage thereby. Defendant practically admits that it is guilty of an unconscionable breach of faith and admits that some one is seriously wronged and damaged, but urges that it is not the plaintiff. *Minnesota Thresher Mfg. Co. v. Heipler*, 49 Minn. 395.

GILFILLAN, C. J. Plaintiff was agent for Simon Clark & Co., and, as such, deposited money of theirs with defendant to the credit of himself,—“A. J. Miller, Agent.” Afterwards Simon Clark & Co. made an assignment in insolvency.

Whether plaintiff could or could not, while his agency continued, maintain an action in his own name on the deposit, he certainly could not after his relation to the deposit ceased by the revocation of his agency with respect to it.

The assignment of his principals, Simon Clark & Co., worked such revocation.

Order reversed.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 309.)

57	323
61	412

L. H. HAWKINS *vs.* MOSES MANSTON *et al.*

Submitted on briefs April 26, 1894. Reversed May 24, 1894.

No. 8641.

Trial of challenge of juror.

When a challenge of a juror for actual bias is, by consent, tried by the court, its finding is conclusive.

Verdict not supported by the evidence.

Evidence considered, and *held* not to justify the verdict.

Appeal by defendants, Moses Manston, John A. Bowman Jr., Courtney A. Buell and Benjamin Herrig, from a judgment of the District Court of Itasca County, *G. W. Holland, J.*, entered July 12, 1893, against them for \$104.67 damages and \$70.21 costs.

The plaintiff, L. H. Hawkins, brought this action for false imprisonment. At the trial November 2, 1892, John Beckfelt was called as a juror and was challenged by defendants for actual bias. The challenge was denied and by consent was tried by the court. The challenge was found not true and defendants excepted. From the evidence given it appeared that John McCaffrey was shot and killed by one Tom Lewis on August 27, 1892, in the street in the Village of La Prairie, that Lewis was arrested but escaped and that plaintiff, L. H. Hawkins, was a lawyer residing in the village and was suspected of aiding and advising in the escape, that a public meeting was held at which P. H. Varley was appointed to select eight assistants and make every possible effort to discover and rearrest Lewis, that Varley afterwards on the same day arrested the plaintiff without warrant or accusation and detained him in the village lockup for two hours on suspicion that he had aided in concealing Lewis

and effecting his escape. The defendants were at the meeting of citizens. The jury found a verdict for plaintiff and assessed his damages at \$100. Defendants moved for a new trial but were refused and judgment was entered on the verdict. They appeal from the judgment.

True & Neal, for appellants.

W. Hammons, for respondent.

GILFILLAN, C. J. The first and second assignments of error are not well founded, because it is settled that where a challenge of a juror for actual bias is, by consent, tried by the court, its finding is conclusive. *Morrison v. Lovejoy*, 6 Minn. 319 (Gil. 224), in a civil action, and *State v. Mims*, 26 Minn. 183, (2 N. W. 494, 683,) in a criminal action.

Permitting testimony that Varley, one of the three men who arrested plaintiff, said he had orders from the defendant Manston to make the arrest, was error. No such connection between Varley and Manston with respect to the arrest of plaintiff was shown as to make the declarations of one evidence against the other. For this error the judgment must be reversed as to Manston.

The evidence was not such as to justify a finding that any of the other defendants were in any way connected with the arrest or detention. As to Buell, aside from his presence at the meeting hereafter referred to, the only evidence was that, he being a justice of the peace, Varley and the other two, upon arresting plaintiff, took him before Buell, who, upon plaintiff's demand to know why he was arrested, said there was no warrant or complaint before him,—that he was under arrest by order of the village council. Buell took no action in the matter, made no order for his detention, and he afterwards told Varley to let him go. The place of a justice of the peace would be a hard one if, on that sort of evidence, he could be held as a party to the unlawful arrest and detention.

As to Bowman and Herrig, they could not be claimed to have had any connection with the arrest unless by reason of their being present at a meeting of citizens. A murder had been committed in the place, the murderer had been arrested, and had made his escape. The purpose of the meeting seems to have been to take measures for his rearrest. The meeting appears to have been some-

what excited, as was natural, and its proceedings somewhat disorderly; but it is clear it was resolved to offer a reward, to appoint Varley to associate eight others with him to search for and rearrest the murderer, and also to arrest one Nevo, the murderer's brother-in-law. An effort was made at the trial to show, also, that a motion was made and carried to arrest plaintiff. The attempt to prove this was by the testimony of a witness whose account was, from some cause, so rambling, confused, and self-contradictory as to be utterly unreliable when opposed to the direct and positive testimony of five or six others, who were present at the meeting, who testify that no motion to arrest plaintiff was carried or made, and that the only reference to plaintiff was that, after the motion to arrest Nevo was carried, some one in the rear of the meeting near the door called out, "And arrest the man with him" (who was plaintiff).

The court ought to have directed a verdict, as requested, for the defendants Buell, Bowman, and Herrig.

Judgment reversed as to all the defendants.

Buck, J., absent, sick, took no part.

(Opinion published 59 N. W. 309.)

NEWTON R. FROST *vs.* ST. PAUL BANKING & INVESTMENT CO. *et al.*

Argued May 11, 1894. Affirmed May 24, 1894.

No. 8671.

Adverse party defined.

The adverse party, on whom a notice of appeal is to be served, is the party, whether plaintiff or defendant, whose interests in the question sought to be raised on the appeal are adverse to the appellant's.

The rights of parties not served with the notice of appeal can not be adjudicated here.

So where there are several parties to the action or proceeding, some of whom are not served with the notice of appeal, the court will consider only those questions between appellant and the parties served in which the interests of those not served are not adverse to the claims of the appellant.

57	325
60	88
57	325
62	377
57	325
65	379
66	191
57	325
68	294
57	325
74	10

A judgment as evidence.

A judgment for the recovery of money is, as against everybody, evidence of a debt, from and after its rendition, from the judgment debtor to the judgment creditor.

Circumstances under which stockholders' liability may be enforced.

A judgment against a corporation and others jointly for the recovery of money is a debt of the corporation, for the purpose of enforcing against stockholders liabilities for unpaid subscriptions, and their statutory liability.

Appeal by defendants, Daniel W. Lawler and Arthur B. Ancker, from a judgment of the District Court of Ramsey County, *Charles D. Kerr, J.*, entered April 21, 1893, against them and others.

The defendant, the St. Paul Banking and Investment Company, is a corporation organized September 1, 1887, under 1878 G. S. ch. 34. Title 2, to buy, improve and sell lands and to deal in stocks and securities and loan money. It rented of plaintiff, Newton R. Frost offices at Nos. 28 and 30 East Fourth street, St. Paul, for two years at \$133.33 per month payable monthly in advance. Wallace J. Hope, W. H. Swinton and J. P. Frye signed the lease as sureties for the corporation. On November 13, 1889, Frost recovered judgment for \$1,285.35 against the corporation and its sureties for rent and on February 11, 1891, he recovered another judgment for \$567.56, for subsequent rent, against the corporation only. Executions upon both judgments were issued and returned unsatisfied. The defendants, Lawler and Ancker and ten others, were holders of stock in the corporation. Its total stock was \$200,000 divided into shares of \$100 each. Only forty of the shares were ever subscribed for or issued. Lawler subscribed for four shares, but paid nothing thereon. Ancker subscribed for four shares and paid in on them \$200 only. The total amount paid in on the forty shares subscribed was but \$580. Some of the subscribers were nonresidents of this state and had no property therein, others were insolvent. The corporation was also insolvent but owed no debts except the two judgments and a debt of \$94 to the St. Paul Sash and Door Company. The plaintiff brought this action under 1878 G. S. ch. 76 against the corporation and the holders of the forty shares of stock stating these facts and asking that the property and effects of the corporation be sequestered, that a receiver be appointed, that the stockholders be severally required

to pay their unpaid subscriptions for their stock and further sums to the amount of their stock and that the two judgments and all other debts be paid from the proceeds and for such other and further relief as to the court should seem equitable. Answers were filed on behalf of the resident solvent stockholders. The St. Paul Sash and Door Company intervened and presented its claim and the issues were tried February 26, 1892; findings were made and judgment entered April 21, 1892, appointing Edward B. Graves receiver of the corporation and directing him to collect its assets and convert the same into money and to collect from the stockholders the unpaid amounts due on their stock and to report to the court. The decree further adjudged that each of the stockholders served with process in the action naming them pay to said receiver the amount owing by him upon his shares of stock, stating the amount due from each. The decree further adjudged that each of the said stockholders was liable to the receiver in a further additional sum equal to the par value of the shares of stock subscribed for and owned by him, stating the sum each was liable for. The decree further directed the receiver to report to the court the amount realized from the assets of the corporation and from unpaid subscriptions. He was also directed to report the costs and expenses and his fees and the sum necessary to pay any balance due to creditors. The decree then directed each of said stockholders to pay upon his individual liability his proportionate part of the deficit and provided that writs of execution issue from time to time under the direction of the court to enforce such payments. The stockholders, Lawler and Ancker, appealed from the judgment, but only served notice of appeal upon the plaintiff and the clerk of the trial court.

Edmund S. Durment, for appellants.

The judgment rolls introduced in evidence by plaintiff showing his two judgments against the corporation were not as against the stockholders evidence of indebtedness of the corporation. It is only for the indebtedness of the corporation that stockholders are liable. Those judgments, if they establish anything, establish that the indebtedness to the plaintiff was the indebtedness of the defendant corporation and three other persons, not the indebtedness of the corporation singly. *Cook, Stockholders, &c.*, § 221.

Executions had been issued to the sheriff and he had made return on them that he could collect nothing, but the writs were not actually filed with the clerk of court until January 23, 1892, just before the trial of this action. No execution was shown to have been returned unsatisfied before this suit was commenced. In that regard plaintiff failed to show a compliance with the statute authorizing a proceeding against the stockholders. *Trippe v. Huncheon*, 82 Ind. 307; *Chesnut v. Pennell*, 92 Ill. 55; *Chandler v. Brown*, 77 Ill. 333; *Chase v. Curtis*, 113 U. S. 452; *Miller v. White*, 50 N. Y. 137; *McMahon v. Macy*, 51 N. Y. 155; *Southmayd v. Russ*, 3 Conn. 52.

The articles of incorporation in evidence show that the capital stock was fixed at \$200,000. Only \$4,000 of stock was subscribed. Defendants' subscription was therefore on its face conditional, was without consideration and not effectual as a contract until the full \$200,000 should be subscribed. *Masonic Temple Ass'n v. Channell*, 43 Minn. 353; *Livesey v. Omaha Hotel Co.*, 5 Neb. 50; *Hawley v. Upton*, 102 U. S. 314; *Montpelier & W. R. R. Co. v. Langdon*, 46 Vt. 284; *Chase v. Sycamore, &c., R. Co.*, 38 Ill. 215; *Ft. Edward & Ft. M. P. R. Co. v. Payne*, 17 Barb. 567; *Evansville, &c., R. Co. v. Shearer*, 10 Ind. 244.

James E. Trask, for respondent.

This court has no jurisdiction over the subject matter of this case because the appeal is from the whole judgment, but the notice of appeal was not served on the receiver or upon the St. Paul Sash and Door Company, or upon the other stockholders, codefendants with these appellants. The service of notice of appeal upon all of the adverse parties within the time allowed for appeal is a jurisdictional prerequisite. *Grand Rapids v. Chicago & W. M. Ry. Co.*, 95 Mich. 473; *Stolt v. Chicago, M. & St. P. Ry. Co.*, 49 Minn. 353; *Tierney v. Dodge*, 9 Minn. 166; *Portage Lake & L. S. S. C. Co. v. Haas*, 20 Mich. 326.

The term "adverse party" includes everyone who is interested in the subject matter of the appeal and who will be affected by the reversal or modification of the order or judgment appealed from. It is so held in New York, where the statute is similar to our own.

Thompson v. Ellsworth, 1 Barb. Ch. 624; *Hiscock v. Phelps*, 2 Lans. 106; *Senter v. DeBernal*, 38 Cal. 637; *Estate of Medbury*, 48 Cal. 83; *Barnes v. Stoughton*, 6 Hun. 254; *Cotes v. Carroll*, 28 How. Pr. 436; *Smetters v. Rainey*, 14 Ohio St. 287; *Curten v. Atkinson*, 29 Neb. 612; *Wolf v. Murphy*, 21 Neb. 472; *Hendrickson v. Sullivan*, 28 Neb. 790; *Masterson v. Herndon*, 10 Wall. 416; *Williams v. Bank of U. S.*, 11 Wheat. 414; *Simpson v. Greeley*, 20 Wall. 152; *Halloran v. Midland R. Co.*, 129 Ind. 274; *Babcock v. Sanborn*, 3 Minn. 141; *Ash v. Ash*, 89 Ia. —.

The only question left before the court is as to whether or not the insolvent corporation is indebted to Frost, as found and adjudged by the court below. The judgments were at least *prima facie* evidence that the debt sued upon was a debt for which the corporation was liable. *Hawes v. Anglo-Saxon P. Co.*, 101 Mass. 385; *Came v. Brigham*, 39 Me. 35; *Holyoke Bank v. Goodman P. Mfg. Co.*, 9 Cush. 576; *Milliken v. Whitehouse*, 49 Me. 527; *Burgess v. Seligman*, 107 U. S. 20; *Bissit v. Kentucky River N. Co.*, 15 Fed. Rep. 353; *Belmont v. Coleman*, 21 N. Y. 96; *Merchants' Bank v. Chandler*, 19 Wis. 434; *Henry v. Vermillion & A. R. Co.*, 17 Ohio, 187.

The execution and sheriff's return thereon were not filed with the clerk at the commencement of the action, but this does not change the fact that the sheriff had made his return. No question was made but that the St. Paul Banking and Investment Company was and is insolvent. This was sufficient to dispense with the return of execution as a prerequisite to the proceedings to subject the stockholders to payment of corporate debts. *Morgan v. Lewis*, 46 Ohio St. 1; *Hodges v. Silver Hill Mining Co.*, 9 Oregon, 200; *Walton v. Coe*, 110 N. Y. 109; *Terry v. Tubman*, 92 U. S. 537; *Merchants' Nat. Bank v. Bailey Mfg. Co.*, 34 Minn. 323.

Whatever may be the liability of appellants to the corporation, as to this plaintiff, they are shareholders. *Morawetz, Corp.* §§ 821-823; *Scovill v. Thayer*, 105 U. S. 143; *Cook, Stockholders*, § 192.

GILFILLAN, C. J. Newton R. Frost, having recovered two judgments against the corporation defendant, instituted proceedings against it, under 1878 G. S. ch. 76, § 9, making these appellants and others stockholders of the corporation, codefendants, for the pur-

pose of enforcing their liability for unpaid subscriptions, and their statutory liability. Another creditor of the corporation came into the proceeding, and proved his claim. And such proceedings were had that the court entered a decree establishing the claims of Frost and of the other creditor; appointing a receiver; determining the liability of each of twelve stockholders, defendants, including appellants, on unpaid subscriptions and the amount thereof, and the statutory liability of each, and the maximum amount thereof; directing the receiver to convert the property, things in action, stock, and assets of the corporation, into money, and collect the amount for unpaid subscriptions determined to be due from each stockholder, and out of the proceeds of such sales and collections to pay the costs and disbursements in the action, the charges of executing the trust, and to pay said claims, and to make report to the court, stating the amount realized and so paid by him. And if, then, there shall remain a part of the claims unpaid, it directs that each stockholder defendant pay upon his statutory liability such proportion of the deficit as his stock bears to the aggregate par value of all the stock of all the stockholder defendants; and it also provides for a reapportionment of the amount so to be paid, if the share of one or more of the stockholders cannot be collected, by reason of insolvency.

From this decree, two of the stockholder defendants took an appeal, directing their notice only to Frost and the clerk.

The respondent moved to dismiss the appeal on the ground that the appeal, as taken, does not give this court jurisdiction to review the judgment, because all the parties to, and interested in, it, are not before the court. That motion was denied on the ground that, though the appeal is taken from the judgment generally, not from any specified portion, we can consider on the appeal any question between the appellants and respondent in which parties not served with the notice of appeal are not interested adversely to the appellants.

The statute requires the notice of appeal to be served on the adverse party. This does not mean the party adverse in position in the title to the action or proceeding. Thus, if the appellant is a defendant, the plaintiff is not necessarily the adverse party in the question sought to be raised by the appeal. A defendant may be

the adverse party, as to that question; and, for the purpose of presenting that question, he is the proper party respondent. In this case there is but one question, between the appellants and Frost, as to which no other party is interested adversely to appellants. The parties not served may be benefited, but cannot be prejudiced, by a decision in favor of appellants on that question. We can hear that question on the appeal, but no other.

That relates to the proof of Frost's claims. His judgments against the corporation were rendered before this proceeding was begun. The question made in respect to them is, are they evidence of indebtedness of the corporation in a proceeding to enforce the liability of stockholders for unpaid subscriptions, and the statutory liability? We have no doubt they are. As against others than parties and their privies, a judgment (in personam, at any rate) is not evidence of the antecedent existence of the facts on which it is rendered. But it is, as against everybody, evidence of its rendition, and of the legal consequences resulting from its rendition. 1 Greenl. Ev. § 538. If it transfer the title of property from A. to B., it is, from and after its rendition, as fully evidence of the transfer as would be the most solemnly executed instrument between the parties. And so, if it be for the recovery of money, it is evidence of a debt, from and after its rendition, as fully as could be any other transaction between the parties. When it is, as against any one but the parties, used as evidence of the debt, it is, of course, subject to be impeached for fraud or collusion.

In this case, it was sufficient that a debt from the corporation to Frost existed when the proceeding was begun. How long it existed before that is immaterial.

That one of the judgments was recovered against the corporation and others jointly makes it none the less a debt of the former. The remedy against stockholders, either for unpaid subscriptions or on the statutory liability, is not confined to separate debts of the corporation, or those for which it alone is liable.

Judgment affirmed.

COLLINS and BUCK, JJ., took no part in the decision.

(Opinion published 59 N. W. 308.)

ALBERT W. POWERS vs. CHICAGO, MILWAUKEE & ST. PAUL RY. Co.

Submitted on briefs May 16, 1894. Affirmed May 24, 1894.

Death of boy caused by his own negligence.

Evidence considered, and *held* to show a bright, intelligent boy of thirteen, familiar with the running of railroad trains, and warned not to get on and off them when in motion, responsible for the consequences of his own negligence in doing so.

Appeal by plaintiff, Albert W. Powers, administrator of the estate of Albert S. Powers, deceased, from a judgment of the District Court of Fillmore County, *Jno. Q. Farmer, J.*, entered June 3, 1893, against him for costs, \$54.59.

Albert S. Powers, deceased, came to his death March 29, 1890, on the railway of the defendant, the Chicago Milwaukee and St. Paul Railway Company, at Fountain in the manner stated in the opinion. His father was appointed administrator of his estate and brought this action under 1878 G. S. ch. 77, § 2, for the benefit of the boy's next of kin. After plaintiff's evidence was all in the defendant moved that the action be dismissed on the ground that there was no evidence of negligence on the part of the defendant and that there was ample and uncontradicted evidence given by plaintiff's witnesses that the boy was guilty of the grossest negligence. The court granted the motion and dismissed the action. Plaintiff excepted. Judgment was entered and plaintiff appeals.

H. S. Bassett and Gray & Thompson, for appellant.

H. H. Field and Wells & Hopp, for respondent.

GILFILLAN, C. J. A train of the defendant, what in railroad business is called a "wild train," consisting of a locomotive, tender, and caboose car, on which no persons except the servants of the defendant in charge of it were permitted to ride, started at Fountain to run to the next station. The plaintiff's son, a bright, intelligent boy, over thirteen years of age, accustomed to be about the station, and familiar with the moving of trains, after the train started, got on the lower step of the front platform of the caboose, holding with both hands to the iron railings to be taken hold of by one getting on or off the car, and, after riding a short distance, stepped off to the ground, and, retaining his hold on the railings, the train moving

quite rapidly, ran along with the train for a short distance, got upon the step again, rode some 300 feet, and was either thrown off by the motion of the car, or stepped off and fell, and was thrown under the car and killed. That, in getting on and off and standing on the step while the train was in rapid motion, he was doing perilous things, putting himself in a position of great danger, must be apparent to any one who has seen railroad trains moving, and must have been as well known to a boy of his age, intelligence, and experience, especially one who had been, as he had been, warned by his father not to get on and off trains when in motion, as to any one. There was no evidence from which it could be found that any servant of defendant saw him when on, or getting on or off, the step; so that the rule requiring one to use reasonable care to avoid injuring another whom he sees in a position of danger, even through the negligence of such other, does not apply. If the evidence that defendant's servant at times allowed boys to get on trains and ride to a particular switch, and there step off and adjust the switch, might make out that the boy was not a trespasser in getting on the caboose, yet that would not relieve him from the consequences of his own negligence. That his negligence was the immediate cause of his death is, on the evidence, beyond question.

Judgment affirmed.

(Opinion published 59 N. W. 807.)

CROOKSTON IMPROVEMENT Co. *vs.* ANNIE L. MARSHALL *et al.*

Submitted on briefs May 17, 1894. Affirmed May 25, 1894.

No. 8820.

Findings supported by the evidence.

Evidence *held* sufficient to justify the reformation of a deed.

Reformation of deed erroneously made by mutual mistake.

Although the terms of a deed are stated according to the intention of both parties, yet a reformation may be had if they were in error in respect of the thing to which these terms apply.

Same—Where there is mistake on one side and fraud on the other.

The mistake of one party, accompanied by fraud or other inequitable conduct of the other party, may be good ground for the reformation of a written instrument.

Appeal by defendants, Annie L. Marshall, L. D. Marshall her husband, Maria Munch, William Munch, her husband, Emma E. Kelsey and W. E. Kelsey, her husband, from an order of the District Court of Polk County, *Frank Ives, J.*, made January 13, 1894, refusing their motion for a new trial.

In the United States survey of the public lands where Crookston is now situated the elbows of the Red Lake River broke up into lots the ordinary government subdivisions. Lots six (6) and seven (7) in Section 25, T. 150, R. 47, and Lot four (4) in Section 30, T. 150, R. 46, comprised a portion of the west bank around which the river flowed on the north, east and south. Lot four (4) contained eleven acres and lay east of and adjoining the other lots and was the extreme eastern end of the peninsula. Julius Bjornstad owned these three government lots and laid out Sampson's Woodland Addition to Crookston upon the two western lots. In surveying and staking out the town lots he unconsciously got over the east line onto the government lot four (4) from forty to seventy five feet. He soon after on April 6, 1883, conveyed all three government lots to the plaintiff, Crookston Improvement Company, and it afterwards sold to settlers the eastern town lots in the plat and dwelling houses were built on several of them. On August 26, 1892, plaintiff conveyed to defendants, Annie L. Marshall, Maria Munch and Emma E. Kelsey for \$1,200, government lot four (4), not knowing at the time that the platted town lots overlapped upon its western border. Discovering this fact it brought this action to reform the deed so as to except therefrom the strip along the west line of government lot four (4) covered by the town lots, claiming that on the sale its agent Sampson pointed out on the ground to the defendant's agent Munch the land intended to be conveyed as about eleven acres in the elbow of the river, between the platted town lots and the river and that stakes, fences and improvements marked the line between the platted addition and the unplatted land to the east. The court made findings of these facts and ordered judgment for plaintiff reforming the deed. Defendants moved for a new trial. Being denied they appeal.

A. A. Miller, for appellants.

To change the terms of a written instrument the evidence must be clear, onvining and satisfactory. *Beard v. Linthicum*, 1 Md. Ch.

345; *Hunter v. Bilyeu*, 30 Ill. 228; *Bailey v. Bailey*, 8 Humph. 230; *Nevius v. Dunlap*, 33 N. Y. 676; *Lyman v. United Ins. Co.*, 2 John. Ch. 630; *Graves v. Boston M. Ins. Co.*, 2 Cranch 419; *Ford v. Joyce*, 78 N. Y. 618.

The mistake must be mutual and must be clearly made out by satisfactory proof, by evidence clear of all reasonable doubt. *Guernsey v. American Ins. Co.*, 17 Minn. 104; *Sloan v. Becker*, 34 Minn. 491; *Gillespie v. Moon*, 2 John. Ch. 585; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Miner v. Hess*, 47 Ill. 170; *Shattuck v. Gay*, 45 Vt. 87; *Newton v. Holley*, 6 Wis. 592; *Lake v. Meacham*, 13 Wis. 355; *Wells v. Ogden*, 30 Wis. 637.

H. Steenerson, for respondent.

The point of land in the bend of Red Lake River here in question comprised government lots Nos. 6 and 7, in Sec. 25, T. 150, R. 47, and Lot 4, in Sec. 30, T. 150, R. 46. On April 16, 1883, it was all owned by Julius Bjornstad who platted Sampson's Woodland Addition to Crookston as lying on lots 5 and 6, but as staked out on the ground it extended from forty to seventy five feet over, eastward upon lot 4. Bjornstad and wife on April 16, 1883, conveyed all of the addition to plaintiff corporation and also conveyed to it lot 4 which lies directly east of the other tract and forms the extreme eastern point of the peninsula. The parts of the addition overlapping onto lot 4 are the eastern portion of blocks 1, 2, 3 and 4. In 1883 and 1885 plaintiff conveyed the most easterly lots in block 1 and in block 2, and in 1887 in block 3 to innocent purchasers, and these lots have been occupied, and valuable improvements made, prior to the conveyance in dispute.

The addition was surveyed by O. L. Hamery, surveyor, and proper monuments erected. Stakes were driven at the corners of each block and streets plainly marked on the ground. The east line of the addition was supposed to coincide with the west line of government lot 4, and there was, at the time of laying out and platting, a line blazed on the trees across this point of land at this place which was assumed to be the section line. Afterwards there was a fence erected across the point nearly on this blazed line. In the spring or summer of 1892 Mr. Munch acting for grantees came to Mr. Sampson,

president of the plaintiff, and asked to purchase the land east of the fence. Afterwards Sampson went with Munch on the ground and showed him the line and also showed him the fence and told him the line only ran a few feet from the house, and showed him the actual east line of Sampson's Woodland Addition as staked out on the ground. He took him over there two or three times while they were talking over the bargain.

Munch lived on block 7 in the same addition over seven years prior to this purchase. Three days after deed was delivered Munch got surveyor Ralph to run the section line and he located this line from fifty to seventy feet in on the platted portion. Then Munch built a fence on this line, fencing in the houses of these people and closing the streets, the fence running from river to river. Munch testifies that he did not know where the line was and did not know that government lot 4 overlapped the addition. That is just what Sampson was ignorant of, too, so there is no dispute but that the mistake was mutual. The lines actually run and marked upon the ground will control. *Holst v. Streit*, 16 Neb. 249; *Evansville v. Page*, 23 Ind. 525; *Marsh v. Mitchell*, 25 Wis. 706; *Lampe v. Kennedy*, 45 Wis. 23; *McClintock v. Rogers*, 11 Ill. 279; *Diehl v. Zanger*, 39 Mich. 601.

MITCHELL, J. The only question in this case is whether the evidence justified the decision of the trial court that plaintiff was entitled to a reformation of its deed to defendants, having in mind the rule that to entitle a party to such relief the proofs must be clear, satisfactory, and convincing,—that a mere preponderance of evidence will not suffice.

One Bjornstad (plaintiff's grantor) owned government lots 6 and 7 in section 25, and lot 4 in section 30, lot 4 lying immediately east of lots 6 and 7. He platted Sampson's Woodland addition to Crookston as on lots 6 and 7, the east line of the addition being supposed and intended to be the line between those lots and lot 4, but, as staked out on the ground, the plat in fact extended, as has since been ascertained, from 40 to 75 feet eastward over upon lot 4. When the survey was made, stakes were stuck at the corners of the lots and blocks, including those on the east line of the plat. What was east of the platted portion was marked "Reserved for

Park," and was supposed to comprise the whole of lot 4. All of this property, both platted and unplatted, was subsequently conveyed to defendant, which had, prior to the deed in controversy, conveyed several of the lots on the east side of the plat to various parties, who had erected houses and made other improvements thereon.

The transaction between the parties to this suit was entirely conducted on behalf of the plaintiff by one Sampson, its president, and on behalf of the defendants by one Munch.

The evidence is very strong to the effect that what Sampson agreed and intended to convey was the unplatted portion of the land, he supposing that its west line was the west line of lot 4, or substantially so; that he so informed Munch, and pointed out to him the stakes on the east-side of the plat as being the line of the land proposed to be sold and conveyed. Under this condition of things, the deed was executed, describing the premises as lot 4, which, for the reasons stated, includes from 40 to 75 feet of the platted ground. It is true the terms of the deed are stated according to the intent of both parties, but there was a mistake of both (taking the view of the facts most charitable towards Munch) in respect of the thing to which those terms applied, to wit, boundary.

What was intended was to convey the unplatted, and not any part of the platted, land, and they used the description they did because of their mistake in supposing that the west line of the unplatted land was the west line of lot 4. This was a mistake of fact which would justify a reformation of the deed. 2 Pom. Eq. § 853. The only other hypothesis is that Sampson was laboring under the mistake, and that Munch, knowing that fact, concealed the truth from him in order to secure a conveyance of land which he knew Sampson never intended or agreed to convey. This would be a case of a mistake of one party accompanied by fraud or inequitable conduct of the other party, which is also good ground for reformation of a written instrument. 3 Pom. Eq. § 1376.

Had the agreement been to convey lot 4, and had there been merely a mutual mistake as to its boundaries, this would have constituted no ground for a reformation of the deed. But, assuming the presence of good faith on the part of Munch, it seems to us that there was ample proof of mutual mistake; that is, that there was

a meeting of the minds of both parties—an agreement actually entered into—that it was the unplatted land that was to be conveyed, but that they used the description they did because of a mistake in respect to the land to which that description applied. With knowledge of the existence of the improvements made by plaintiff's grantees on several of the lots on the east side of the plat, it is hardly possible that Munch could have honestly believed that he was buying, or that Sampson intended to sell, those lots.

Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 294.)

In re IRON BAY COMPANY, Insolvent.

Argued May 11, 1894. Affirmed May 25, 1894.

No. 8618.

A contract construed.

A certain contract construed.

Appeal by claimant, Howe Lumber Company, a corporation, from an order of the District Court of St. Louis County, *Charles L. Lewis, J.*, made December 2, 1893, denying its motion for a new trial of its claim against the estate of Iron Bay Company, insolvent.

On April 2, 1892, the Iron Bay Company, a corporation, being insolvent made an assignment of its property to F. W. Paine under Laws 1881, ch. 148, as amended, in trust for the equal benefit of all its creditors who should present their claims and file releases. The Howe Lumber Company in due time presented to the assignee a claim as follows: It owned and operated a sawmill at Tower. The Iron Bay Company was engaged in the manufacture at West Duluth of band saws and accompanying machinery for equipping sawmills. On December 14, 1891, it wrote to the Howe Lumber Company the following proposal:

"We submit for your consideration proposition to furnish your company one right hand Iron Bay band mill, in place in your sawmill

in Tower, Minnesota, on or before January 15, 1892, ready to run. Said mill to be on trial for ninety days. If said band mill prove satisfactory your company to pay us for the same the sum of \$1,000. If it proves unsatisfactory, we agree to take the band mill out within five days of the receipt of notice and to replace your mill in same condition as found by us. We further agree in such an event to pay you an indemnity of \$1.60 per 1,000 feet of all lumber cut less than 50,000 feet per day between January 15, and February 1, 1892, provided the balance of your mill shall be in proper condition to run during the time, and you shall have furnished us a sufficient number of logs to make the necessary cut, viz. 50,000 feet per day."

The proposal was accepted and on January 25, 1892, the band-mill was in and ready to run. The claimant commenced on that day to operate it but it did not work satisfactorily and the insolvent was notified. It asked to have the time of trial extended ten days to readjust machinery and allow a fair trial of its merits, saying: "We agree to still continue the \$1.60 per M." The claimant consented to the extension and finally on March 5, 1892, accepted the mill and agreed to pay the \$1,000 less payments already made. The Howe Lumber Company on November 28, 1892, presented to Paine, assignee, the claim that the lumber cut by the mill from the time it started January 25, until it was accepted March 5, was but 454,052 feet, that in the intervening time it should have cut 50,000 feet each working day and asked to be allowed \$1.60 per thousand feet on the deficiency. The assignee rejected the claim and the Howe Lumber Company appealed to the court where the assignee presented as a counterclaim the unpaid balance of the purchase price of the machinery, but on the trial withdrew it by permission of the court. This claim of the Howe Lumber Company was disallowed on the ground that by the terms of the proposal the claim could not accrue unless the mill proved unsatisfactory and was taken out. The claimant moved for a new trial, but was refused and it appeals.

White & McKeon, for appellant.

The controversy in the cause arises over the construction of the contract and certain extensions under which the insolvent furnished a band mill to claimant to be used in its saw mill at Tower. The principal error of the court was in assuming that the contingency

upon which defendant was to pay plaintiff an indemnity was, that it should take out its band mill, instead of, that its mill should prove unsatisfactory.

Draper, Davis & Hollister, for respondent.

The trial court could not upon the appeal render judgment in favor of the assignee of the insolvent company for any sum that might be due from the claimant. It nowhere appears in the record except in the memoranda of the court that the assignee ever asserted a counter claim.

The only difference between the parties is, the construction of the contract. There is no unqualified agreement to pay \$1.60 per thousand feet for all lumber cut less than 50,000 feet per day between January 15, and February 1, or for any other time. The Iron Bay Company in "such an event" agrees to pay an indemnity. Now, to what do the words, "in such an event" refer? They must, we submit, refer to the event of the mill proving unsatisfactory and being rejected and taken out.

MITCHELL, J. This appeal involves merely the construction of a contract. The case turns upon the question, to what do the words "in such an event" (upon the happening of which the "indemnity clause" in the contract was to become operative) refer?

We agree with the trial court that they refer to what immediately precedes, to wit, the event of the band mill proving unsatisfactory, and the giving of such a notice of the fact by plaintiff as would require the defendant to take it out, and restore plaintiff's sawmill to its former condition; in other words, that the indemnity of \$1.60 per M. was to be paid only in case, after full trial, the band mill proved unsatisfactory, and the plaintiff, for that reason, finally concluded not to take it, and notified defendant of that fact.

The promise of defendant, when asking for an extension of time, "to continue the \$1.60 per M.," must be construed as meaning merely to continue that same agreement in case the mill finally proved unsatisfactory after the proposed changes. The promise to pay plaintiff the expense caused by its mill being shut down from February 8th to February 25th is not consistent with the idea that defendant was also to pay the indemnity of \$1.60 per M. during the same time.

If plaintiff has any claim for damages for the loss of the use of the mill during the delay it must be for breach of the contract, and not under this indemnity clause.

There is nothing in the point that the court erred in allowing defendant to dismiss its counterclaim. The matter was within the discretion of the court. Furthermore, we fail to see how the plaintiff is at all prejudiced.

Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 346.)

57 341
64 252

JOHN D. CLEGHORN *vs.* MINNESOTA TITLE INS. & TRUST CO. *et al.*

Argued May 14, 1894. Affirmed May 25, 1894.

No. 8776.

Pledge of commercial paper, how foreclosed.

While the pledgee himself cannot, without express authority to the contrary, sell commercial paper pledged as collateral, yet a court may at least, under special circumstances, order a judicial sale of it.

Appeal by Minnesota Title Insurance and Trust Company, one of the defendants, from an order of the District Court of Hennepin County, *Thomas Canty, J.*, made December 14, 1893, overruling its demurrer to the complaint.

On October 13, 1892, defendant Oliver B. Whitney was indebted to the plaintiff John D. Cleghorn in the sum of \$6,000 and interest, past due. On that day Whitney assigned to plaintiff as collateral security a note and mortgage for \$7,000 made to him by George S. Bicknell dated August 25, 1892, and due five years thereafter, bearing six per cent interest. On June 28, 1893, Whitney, being insolvent, made an assignment under Laws 1881, ch. 148 as amended, to defendant, Minnesota Title Insurance and Trust Company of all his nonexempt property in trust for his creditors, and it accepted the trust. On October 25, 1893, plaintiff filed with it his claim for the \$6,000 and interest stating that he intended to

exhaust his collateral security and look to the assigned estate for any deficiency. The complaint stated these facts and asked judgment against defendant Whitney for \$6,000 and interest and that the Bicknell note and mortgage be sold by the sheriff at public auction and the proceeds applied upon the judgment and that any deficiency be allowed as a claim against Whitney's estate and for such other and further relief as should seem to the court to be equitable in the premises. The defendant, Minnesota Title Insurance and Trust Company, demurred to this complaint and specified as ground of objection that it did not state facts sufficient to constitute a cause of action. The court overruled the demurrer with leave to answer within twenty days on payment of ten dollars costs. The company appeals.

Wm. B. McIntyre, for appellant.

This is an action in equity by the pledgee to sell a promissory note secured by mortgage, pledged as security for a debt of the pledgor. The pledgee is a trustee of the property and for the pledgor and the law is vigilant and jealous in its circumspection of his conduct. It is his duty to collect the note and mortgage when they fall due, not to sell them meantime. *Union Trust Co. v. Rigdon*, 93 Ill. 458; *Wheeler v. Newbould*, 16 N. Y. 392; *White v. Phelps*, 14 Minn. 27; *Lamberton v. Windom*, 12 Minn. 232; *Goldschmidt v. First Methodist Church*, 25 Minn. 202.

The pledge of chattels to secure the payment of a debt implies authority to convert the property into money to apply on the debt, if the pledgor fails in his duty to pay it. But a pledge of commercial paper does not include authority to sell it, because the proper and usual mode of converting it into money is to collect the money upon it when it becomes due. *Merchants' Nat. Bank v. Thompson*, 133 Mass. 482; *Whittaker v. Charleston Gas Co.*, 16 West Va. 717; *Boynton v. Payrow*, 67 Me. 587; *Handy v. Sibley*, 46 Ohio St. 9; *Joliet Iron & Steel Co. v. Sciota Fire Brick Co.*, 82 Ill. 548; *Zimpleman v. Veeder*, 98 Ill. 613.

There being no express contract the pledge is made under an implied contract, implied in law. This contract is, that the security being commercial paper shall not be sold but the pledgee

shall wait until maturity and receive the money due on it then. The court will presume it will be paid at its maturity. After the contract of pledging is made neither party can, by any thing he alone may do, vary the duties or powers attaching to the relation. *Cooper v. Simpson*, 41 Minn. 46; *Minneapolis & N. E. Co. v. Betcher*, 42 Minn. 210.

The plaintiff cannot come into a court of equity and have the pledge foreclosed and sold under the direction of the court for he cannot do indirectly what he cannot do directly. *Whitaker v. Charleston Gas Co.*, 16 West Va. 717; *Boynton v. Payrow*, 67 Me. 587.

Henry J. Fletcher, for respondent.

The insolvency statute provides that no debts for which the creditor holds a mortgage, pledge or other security shall be paid until the creditor shall have first exhausted his security or shall surrender and release the security to the assignee. 1878 G. S. ch. 41, § 28. He is permitted to file his claim but may not participate in the assigned estate without first exhausting his security or surrendering it to the assignee. If the security should not prove sufficient to satisfy his debt he has a right to prove up his claim against the assigned estate for any deficiency. Whether or not there will be such a deficiency will never be known until the security is first exhausted. The assignee is required to collect and realize upon the effects in his hands with all convenient speed, and if the creditor should prefer to surrender the security to him in the case of a note and mortgage, having four years yet to run, it would be the duty of the assignee to ask leave of the court to sell the same precisely as the creditor is now doing. That the court would authorize the assignee to sell the Bicknell note and mortgage if it should be surrendered by the respondent, seems undoubted. There is no reason why the creditor may not realize on this collateral as advantageously as the assignee. If the creditor may not proceed to exhaust the security he holds, he is forced to the alternative of either throwing away his security or of abandoning all claim against the insolvent estate, for long before the note matures the assignment will have been closed up and the assignee discharged.

The rule disapproving of sales of negotiable collateral securities

either at public or private sale, without express contract authorizing such sale, applies where such collateral bills or notes mature earlier than the original debt or obligation, but does not apply to long time paper or negotiable bonds. *Colebrooke, Collat. Securities*, § 117. *Donohoe v. Gamble*, 38 Cal. 340.

MITCHELL, J. The rule of law undoubtedly is that, without express agreement to the contrary, commercial paper pledged as collateral cannot be sold by the pledgee at either public or private sale. The reason for this is that such paper has no market value, and consequently, if exposed for sale, would be liable to be sacrificed.

But the question of the right of a pledgee to come into court, and have a decree for a judicial sale of the pledge, is an entirely different question. This was always a well-recognized head of equitable jurisdiction, even where the pledgee or mortgagee had a right to sell the property. The sale being under the direction and control of the court, it has the power, as it is its duty, to see to it that the property shall not be sacrificed; and hence such a sale is not liable to the evils or abuses to which a sale by a party himself is subject. Just when and under what circumstances a court would or should order a sale of commercial paper or other collateral of similar character it is not necessary to consider. The right to do so, at least under special circumstances, is undoubted. *Pom. Eq.* §§ 164, 1231; *Daniels, Neg. Inst.* § 833; *Jones, Pledges*, § 655; *Donohoe v. Gamble*, 38 Cal. 340.

In the present case the collateral note had some four years to run before it matured. The pledgor had become insolvent, and had made a general assignment for the benefit of all his creditors. The plaintiff had proved his claim in the insolvency proceedings, and had claimed, as he might, the right to participate in the benefits of the assignment in case the pledged property proved insufficient to satisfy his claim in full. Hence, unless the collateral should be sold, the final settlement of the estate of the insolvent would be postponed for several years.

These facts made a proper case, even under the strictest rule, for a judicial sale of the collateral note.

Counsel for defendant argues that the pledge was made under a contract, implied by law, that the paper should not be sold, but that

the plaintiff should wait until its maturity, and then collect it in the ordinary way, and that a court has no power to change the contract of the parties. There is nothing in this point. The question is one of remedy, rather than of contract right; and if the law as to the manner of realizing on the collateral is to be deemed to have entered into, and become a part of, the contract, this would be as applicable to the rule which authorizes a judicial sale as it is to the rule which forbids the pledgee himself to sell.

Order affirmed.

BUCK and CANTY, JJ., took no part.

(Opinion published 59 N. W. 320.)

STATE OF MINNESOTA *vs.* C. E. CORBETT.

Argued April 11, 1894. Reversed May 25, 1894.

No. 8710.

Laws 1893, ch. 66, regulating sale of transportation tickets is valid.

Laws 1893, ch. 66, entitled "An act to regulate the sale and redemption of transportation tickets of common carriers and to provide punishment for the violation of the same," is not unconstitutional. Either as

Special privileges.

"Class legislation" granting special privileges to carriers.

Police powers.

Or as a delegation of the police power of the state to grant licenses to engage in a business.

Interstate commerce.

Or as an interference with interstate commerce.

Due process of law.

Or (at least as to tickets purchased after the passage of the act) as depriving a citizen of his property "without due process of law."

Incidents of a business when subject to police powers of the state.

If a business, as that of common carriers, is a proper subject of police regulation, so are its incidents and accessories; as, for example, the issue and sale of transportation tickets.

The word "owner" defined.

The word "owner," as used in the act, includes all those who operate a railroad or steamboat in the transportation of passengers; as, for example, lessees, receivers, and the like.

On October 18, 1893, the grand jury of Ramsey County brought into court an indictment against C. E. Corbett accusing him of the crime of selling a railroad ticket without a certificate or license authorizing him to engage in the sale of transportation tickets of common carriers. The offense was alleged to have been committed on October 13, 1893, at St. Paul in said county by wrongfully, unlawfully and knowingly selling and delivering to Abner L. Dalrymple for \$2.50 a ticket on the St. Paul and Northern Pacific railroad from St. Paul to Little Falls contrary to Laws 1893, ch. 66. Corbett appeared in court and demurred to the indictment and specified as ground of objection that the facts stated did not constitute a public offense. The court, *John W. Willis, J.*, on January 29, 1894, made an order sustaining the demurrer and discharging the accused on the ground that the statute is unconstitutional and void; because, first, it confers special privileges on a favored class, to-wit, on persons named by railroad companies giving them the privilege of selling railroad tickets, and is therefore special or class legislation; second, it discriminates against tickets bought within the state as compared with those bought outside the state; third, it operates to take property without due process of law, and destroys the value and salable quality of the property of the owner.

The defendant having consented, the judge deeming the question important and doubtful, reported the case and certified it to this court under 1878 G. S. ch. 117, § 11. Meantime, all proceedings in the District Court were stayed.

H. W. Childs, Atty. Genl., *Pierce Butler*, County Attorney, and *Chas. W. Bunn*, for the state.

The law is not objectionable as class legislation. *Fry v. State*, 63 Ind. 552; *Giozza v. Tiernan*, 148 U. S. 657.

The law does not operate to deprive any person of his property without due process of law. *Ogder v. Saunders*, 11 Wheat. 213; *Cooley*, Const. Lim. 159, 160; *Sleeper v. Pennsylvania R. Co.*, 100 Pa. St. 259.

The law is not invalid as creating a tax or burden on interstate commerce. *Gibbons v. Ogden*, 9 Wheat. 1; *Brown v. Maryland*, 12 Wheat. 419; *Woodruff v. Parham*, 8 Wall. 123; *Hinson v. Lott*, 8 Wall. 148; *Brown v. Houston*, 114 U. S. 622; *Morgan v. Louisiana*, 118 U. S. 455; *Smith v. Alabama*, 124 U. S. 465; *Nashville, C. & St. L. Ry. v. Alabama*, 128 U. S. 96.

The law is not unequal in its operation because it applies to the owners of any railroad and does not name the lessees, operators or receivers. Inasmuch as every railroad must have an owner the law must include every railroad. It does not therefore discriminate. It is utterly immaterial to the validity of the law whether the duty to redeem tickets is imposed on the owner of the property or on the person or corporation which operates it. But we suggest that it would be an entirely reasonable construction to say that the word "owner" includes and means "operator."

Horton & Denegre, for the accused.

The law is unconstitutional as class legislation. *Hoffman v. Northern Pac. R. Co.*, 45 Minn. 53; *Arrowsmith v. Burlingim*, 4 McLean, 489; *Giozza v. Tiernan*, 148 U. S. 657.

The law is in violation of the 14th amendment to the constitution of the United States, in that it deprives the citizen of his liberty and property without due process of law. *Sleeper v. Pennsylvania R. Co.*, 100 Pa. St. 259; *Cooley*, Const. Lim. § 181; *Rippe v. Becker*, 56 Minn. 100; *Tiedeman*, Police Powers, § 136; *Dent v. West Virginia*, 129 U. S. 114; *Yick Wo v. Hopkins*, 118 U. S. 356; *Wynehamer v. People*, 13 N. Y. 378.

A similar statute in Illinois was held unconstitutional in a Chicago court and everybody acquiesced in the decision. It has never been questioned and the scalper law of Illinois is today a dead letter. *People v. Gilbert*, 25 Chicago Legal News, 312.

In Texas the law was declared unconstitutional in *State v. Mercer*, an unreported case.

Section 5 of the law which provides for the important matter of redemption of unused tickets and portions of tickets, is not only indicative of slight legislative reflection, but is both meaningless and

valueless. *Arrowsmith v. Burbingim*, 4 McLean, 489; *Louisville & N. R. Co. v. Railroad Commission*, 19 Fed. Rep. 679.

The law is in violation of article 1, § 8, of the constitution of the United States, which provides: "That congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes." *Warren v. Mayor*, 2 Gray, 84; *Slawson v. Racine*, 13 Wis. 398; *Allen v. Louisiana*, 103 U. S. 80; *Burkholtz v. State*, 16 Lea, 71; *Western Union Tel. Co. v. State*, 62 Tex. 630; *Jones v. Jones*, 104 N. Y. 234..

The power to regulate interstate commerce is exclusively vested in congress and any attempts on the part of the states to regulate it are void. It makes no difference in what language the statute is framed. Its purpose must be determined by its nature and reasonable effect. *Leisy v. Hardin*, 135 U. S. 100; *Railroad Co. v. Husen*, 95 U. S. 465; *Hall v. DeCuir*, 95 U. S. 485; *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18; *Chy Lung v. Freeman*, 92 U. S. 275; *Henderson v. Mayor*, 92 U. S. 259; *McCall v. California*, 136 U. S. 104.

MITCHELL, J. The defendant was indicted for selling on October 13, 1893, a railroad ticket of the Northern Pacific Railroad Company from St. Paul to Little Falls, in this state, contrary to the provisions of Laws 1893, ch. 66, § 2, entitled "An act to regulate the sale and redemption of transportation tickets of common carriers and to provide punishment for the violation of the same," approved April 19, 1893. The trial court, having sustained a demurrer to the indictment, has certified the case to this court, pursuant to 1878 G. S. ch. 117, § 11.

We think the statute contemplates that the report and certificate of the trial judge should indicate the particular questions of law which he deems so important and doubtful as to require the decision of this court. In the present case the "memorandum" of the judge, which is incorporated in his report, is the only thing which points out the questions of law upon which he desires our opinion, and it is apparent from this that the only question which he considered or passed upon in sustaining the demurrer was the constitutionality of the statute under which the indictment was found. We shall, therefore, confine ourselves to the consideration of the objections raised

to the validity of that statute. These objections may be all summed up as follows:

(1) It is "class" legislation, in that it gives to persons named by the carriers the exclusive privilege of conducting the business of dealing in transportation tickets.

(2) It delegates to the carriers the police power of licensing persons to conduct the business of dealing in such tickets.

(3) It deprives the citizen of his property in such tickets without due process of law.

(4) It is an unlawful interference with interstate commerce.

(5) It discriminates between incorporated and nonincorporated carriers of passengers, because section 7 imposes a penalty on the former, and not on the latter, for refusing to redeem unused tickets.

Before examining the provisions of the act, or entering upon the consideration of these objections, it may be well to refer briefly to a few elementary principles applicable to such cases.

That the transportation of passengers by common carriers is a proper subject of police regulation by the state is unquestioned; and, if a business itself is the subject of police regulation, then so are all its incidents and accessories. That the matter of the issue and transfer of tickets, as evidences of the contracts of the carriers, is an incident and accessory of the business, needs no argument.

And, where a business is a proper subject of the police power, the legislature may, in the exercise of that power, adopt any measures, not in conflict with some provision of the constitution, that it sees fit, provided, only, they are such as have some relation to, and some tendency to accomplish, the desired end; and, if the measures adopted have such relation or tendency, the courts will never assume to determine whether they are wise, or the best that might have been adopted. *State v. Donaldson*, 41 Minn. 74, (42 N. W. 781); *Rippe v. Becker*, 56 Minn. 100, (57 N. W. 331.)

Furthermore, courts are not at liberty to declare a statute unconstitutional because, in their opinion, it is opposed to the fundamental principles of republican government, unless those principles are placed beyond legislative encroachment by the constitution; or because it is opposed to a spirit supposed to pervade the constitution, but not expressed in words, or because it is thought to be unjust or oppressive, or to violate some natural, social, or political rights of

the citizen, unless it can be shown that such injustice is prohibited or such rights are protected by the constitution.

Except where the constitution has imposed limitations upon the legislative power, it must be considered as practically absolute; and to warrant the judiciary in declaring a statute invalid they must be able to point out some constitutional limitation which the act clearly transcends.

With these elementary propositions in mind, we proceed to consider the evils, or supposed evils, which the legislature designed to remedy, and the measures which they have adopted to accomplish that end. It was commonly asserted and believed (to what extent correctly is not important) that spurious and stolen tickets, and tickets which had expired by limitation, or that were not transferable, were often put on the market to such an extent as to work great frauds upon both the public and the carriers; that frequently those selling such tickets were irresponsible, so that the party defrauded had no redress; that the business of trafficking in such tickets often furnished an inducement to railway employes to steal tickets, or issue spurious ones, and put them on the market. It was also commonly believed that, in order to evade statutes designed to secure uniformity of rates and to prevent discriminations, some carriers of passengers were in the habit of placing large blocks of their tickets with "scalpers," ostensibly not their agents, for sale at cut rates. To remedy these and similar abuses, real or supposed, this statute was passed. That all its provisions have some relation to, and tendency to accomplish, this end, is quite clear. Do they transcend any constitutional limitation upon legislative power?

It seems to us that most of the objections to the act—certainly the first two—are based upon a radical misconception of its provisions, and of the character of transportation tickets as property.

Counsel for the defendant seems to assume—*First*, that such tickets are vendible chattel property, which are the legitimate subject of barter and sale, the same as any other chattels, and, *Second*, that this statute is designed to be a "license law," in the ordinary sense of that term. With these two premises assumed, the task of successfully assailing the validity of the act is a very easy one.

While a "railroad ticket" is, in one sense, "property," yet it is not merchandise or a chattel. It is merely the evidence of the contract

of the carrier to transport the holder between the points, and on the conditions, therein named. Treating it as the contract itself, it is in the nature of a chose in action. No one with whom a carrier makes such a contract has any inherent constitutional right to insist that it should be assignable. At common law, all choses in action were nonassignable, and if the legislature had deemed it necessary, in order to prevent the supposed evils, to provide that all transportation tickets should be nontransferable, or even to prohibit the issue of tickets altogether, and require carriers of passengers to collect fare in cash, we fail to see why they had not the power to do so.

Again, the act has not the first element of a "license law" in the common meaning of the term. It must be borne in mind that these tickets are the contracts, or evidences of the contracts, of the carriers, and hence, in the nature of things, can in the first instance be issued or sold only by the carriers themselves, who, as a matter of course, have the exclusive right to appoint their own agents for that purpose. Now, what the act provides is that the carriers shall only issue or sell their tickets through agents appointed in a particular manner, and the evidence of whose appointment has been authenticated by certain formalities. While the certificate of a compliance with these requirements, issued by the state, is called a "license," yet it is merely the evidence of the appointment of the agent, its purpose being to secure and preserve public written evidence of that fact, so as to prevent evasions of the law, and to enable every one who buys a ticket to ascertain whether the person with whom he is dealing actually represents, and has authority to bind, the carrier. The agent is given no authority to sell or deal in tickets of other carriers, but only authority to sell the tickets of the carrier appointing him, and providing him the certificate of such authority.

So far from granting any special privileges to the carrier, it imposes a burden upon him—*First*, by limiting his right to issue or sell tickets to agents provided with a certificate from the state of their authority; and, *Second*, by requiring him to repurchase or redeem unused tickets. And then, in order to prevent the frauds already referred to, the act prohibits entirely the sale, barter, or transfer, within the state, of the whole or any part of any ticket, or other evidence of the holder's right to travel on any railroad or steamboat, whether situated or operated within or without the state, except by the agent

of the carrier possessing the certificate of authority provided for in the first section of the act.

The fact that the purchaser of a ticket is prohibited from selling it to whom he pleases does not "deprive him of his property without due process of law." The disposition of property may always be limited or regulated where public interests so require. The ticket is not destroyed or taken from the holder, nor is his right to ride on it at all limited. The only limitation is upon his right to transfer it. If he wishes to ride on it, which is the purpose for which a ticket is presumably bought, he can do so; but, if he does not use it, his only course is to require the carrier who issued it to redeem it. As already suggested, a man has no constitutional right to insist that these contracts for transportation shall be transferable; and if the legislature had seen fit to declare that they should not be, and that they could only be used by the party to whom they were originally issued, they might have done so, even without making any provision at all for their redemption by the carrier if not used. This might not be true as to tickets, by their expressed or implied terms transferable, purchased before the passage of the act; but as to the tickets issued and purchased after that it is unquestionably true, for the statute becomes a part of the contract expressed in the ticket, and is inherent in the property in it. *Ogden v. Saunders*, 12 Wheat. 213.

The indictment in this case charges defendant with selling the ticket nearly six months after the passage of the act, and, if the law should be regarded as invalid as to tickets issued and purchased before it was passed, it was for the defendant to plead and prove that he comes within the class of persons as to which the law is invalid, and that this ticket was one as to which the statute does not operate. A law may be entirely valid as to some persons and some acts, and invalid as to others, and its invalidity can be raised and taken advantage of only by those who show that they have a right to question the act. They must show that their rights are taken away by the law, and that as to them, in the particular case, there is a higher law in the constitution which supersedes the statute.

In Indiana and Illinois the courts have upheld statutes similar to the one under consideration in all material respects, except that they provide that the acts shall not prohibit any person who has purchased a ticket from any agent authorized as by the act provided,

with the *bona fide* intention of traveling upon the same, from selling it to any other person. *Fry v. State*, 63 Ind. 552; *Burdick v. People*, 149 Ill. 600, (36 N. E. 948.)

In these cases the courts lay some stress upon this provision. But we are unable to see how the absence of it affects the validity of the act, or how, at least as to tickets issued after its passage, it deprives a person of his property "without due process of law." The law may in that respect be more drastic; but if the legislature thought that such an exception would open the door to evasions of the law, and that the evils aimed at could be effectually remedied only by absolutely prohibiting any sale of tickets within the state except by the carrier himself, through his agents authorized in the manner provided, we think it was competent for them to so declare.

Neither is there anything in the objection that, while the act prohibits the sale of any tickets except in the manner prescribed, it only provides for the redemption of unused tickets of railroads or steamboats situated or operated, in whole or in part, within the state.

This limitation of the provisions as to redemption may have been because of the supposed inability of the state to compel redemption by foreign or nonresident steamboat or railway companies; but, as the sale of all tickets might have been prohibited without any provision for their redemption, the act does not deprive the holder of a ticket of a nonresident carrier simply because it leaves him, in case he does not use it, to such remedies, if any, as may be given him by the law of the domicile of the carrier. It is hardly necessary to suggest that it is just as necessary, in order to prevent frauds on the public, to regulate the sale, within the state, of tickets of "nonresident" carriers as of "resident" ones. We may add, in passing, that section 5 of the act makes it the duty of a carrier within the state to redeem tickets sold by it in "any manner," no matter whether sold within or without the state; also, that the word "owners" is evidently used in a comprehensive sense, so as to include all who are operating a railroad or steamboat, whether as owners of the property, or as lessees, receivers, or the like.

What has been said fully covers the first three objections to the statute.

There is clearly nothing in the objection that the act unlawfully interferes with interstate commerce. In the first place, the question is not in this case, because the ticket is not for an interstate ride. But, even if it was, there would be nothing in the point. The law is not a revenue law, and is not designed to, and does not, regulate interstate commerce at all. It is a mere police regulation of the sale and transfer of tickets, designed to protect the public from frauds, and its interference, if any, with interstate commerce, is purely incidental and accidental. The grant of power to congress to regulate interstate commerce was never designed to, and does not, at all interfere with police power of the states to promote domestic order, to prevent crime, and to protect the lives and property of its citizens, although such regulations may indirectly operate upon and affect interstate commerce. Such regulations are valid in spite of their operation on commerce, and the right to pass them does not originate from any power in the state to regulate commerce. The books are so full of cases to this effect that the citation of authorities in support of the proposition is unnecessary.

Neither is there anything in the last objection. If defendant is correct in his construction of section 7,—that it only imposes a penalty, in favor of the state, upon incorporated carriers for a refusal to redeem unused tickets,—this is not an objection which he is in a position to raise, as it does not affect him. If any owner of a railroad or steamboat situated or operated, in whole or in part, within the state, refuses to redeem his ticket, as provided in section 5, the purchaser has his civil remedy, wholly independently of section 7. Even if the latter section should be declared wholly invalid, on the objection of an incorporated carrier, it would not affect the validity of the balance of the act.

We have endeavored to give this case the consideration which its importance deserves, and are not able to see that any of the objections urged against the validity of the act are well founded. With the policy or wisdom of it we have nothing to do.

Order sustaining the demurrer is reversed, and the cause remanded.

BUCK and CANTY, JJ., abs. nt.

(Opinion published 59 N. W. 317.)

SUVIAH T. DAVISON *vs.* CHARLES K. SHERBURNE *et al.*

Argued May 8, 1894. Reversed May 25, 1894.

No. 8698.

Effect of Partial payment by one partner after dissolution of firm.

A partial payment of a partnership debt, made by one partner after dissolution of the firm, will prevent the bar of the statute of limitations as to the other partners, in favor of a creditor who has had dealings with the partnership, and has had no notice of its dissolution.

Deposition when may be read in evidence.

Atkinson v. Nash, 56 Minn. 472, followed to the effect that where a deposition is taken pursuant to 1878 G. S. ch. 73, § 36, as amended by Laws 1885, ch. 53, it is incumbent on the party wishing to use it on the trial to show that a cause existed, and still exists, for taking it.

Appeal by Charles K. Sherburne, one of the defendants, from an order of the District Court of Hennepin County, *Thomas Canty, J.*, made November 29, 1893, denying his motion for a new trial.

On December 17, 1881, Elijah A. Harmon and Charles K. Sherburne were partners in grocery and crockery business at Minneapolis under the firm name of E. A. Harmon & Co. They borrowed of plaintiff, Suviah T. Davison, of Hartford, Conn., on that day \$2,221 and used it in liquidation of the partnership business. They gave her their note for the amount due three years thereafter, signed, not with the firm name, but with the individual names of the two partners. She did the business by correspondence with Harmon. He was her relative and paid the interest on the note at various times down to December 17, 1889. The defendant Sherburne claimed by his answer, and his evidence on the trial tended to prove, that the partnership was dissolved in June, 1881, and that the note to plaintiff was the individual note of the defendants and was given in settlement of Harmon's individual debt to her, that as to him (Sherburne) the statute of limitations barred a recovery. The jury found for the plaintiff on this question. At the trial on June 9, 1893, the plaintiff offered in evidence the deposition of the defendant, Elijah A. Harmon, taken at his residence at Minneapolis on December 17, 1892, before a Notary Public on notice to defendant Sherburne. He objected on the ground that it did not appear that Harmon was not

then in the city and could not be procured; the objection was overruled and Sherburne excepted. The deposition was then read in evidence and plaintiff had a verdict for \$2,760.47. Defendant Sherburne moved for a new trial. Being denied he appeals.

A. Ueland, for appellant.

The deposition was improperly received in evidence. This identical question was recently decided by this court in the case of *Atkinson v. Nash*, 56 Minn. 472. It was the only question in that case and was elaborately argued. This court held, sustaining the lower court, which had granted a new trial on that ground, that before a deposition so taken can be used the causes or reasons specified in 1878 G. S. ch. 73, § 16, must be shown to have existed for its taking and to still exist when the deposition is offered in evidence. Harmon's deposition was therefore not admissible and a new trial should have been granted for that reason.

This court has adopted the doctrine that one maker of a note cannot by payments take the note out of the statute of limitations as to another. *Willoughby v. Irish*, 35 Minn. 63. The question in this case is whether any payments of interest were made by Sherburne, or rather by his authority, for it is not claimed that any payment was made by Sherburne personally.

To justify the verdict it was necessary for plaintiff to show, (1) that the note was given by Harmon and Sherburne as partners, and (2) that the payments of interest up to December 17, 1886, were made by Harmon as Sherburne's partner. I call attention to the testimony and the court will see that there is nothing to show that the consideration for the note was received by the firm or for the use of the firm and hence that the note was not given for partnership purposes. *Thompson v. Bowman*, 6 Wall. 316; *National Bank of Commerce v. Meader*, 40 Minn. 325; *Griswold v. Waddington*, 16 Johns. 438; *Wells v. Ellis*, 68 Cal. 243; *Kennedy v. Porter*, 109 N. Y. 526; *Hayden v. Cretcher*, 75 Ind. 108; *Bowman v. Blodgett*, 2 Met. (Mass.) 308; *Payne v. Gardiner*, 29 N. Y. 146.

The court submitted the case to the jury with the proposition that if the partnership existed when the note was given December 17, 1881, and the note was given for partnership purposes, Sherburne might be held although the partnership had ceased to exist before

the payments were made which should stop the running of the statute. This should be, because plaintiff meanwhile received no notice of dissolution. But the want of notice of the dissolution could under no circumstances affect Sherburne's liability in this case, for two reasons; first, because the note was on its face notice that he was contracting in his individual capacity and not as a partner; second, because nothing was parted with on the faith of the partnership still existing. *Morrison v. Perry*, 11 Hun, 33; *Brisban v. Boyd*, 4 Paige, Ch. 17; *Walden v. Sherburne*, 15 Johns. 409; *Baker v. Stackpoole*, 9 Cow. 433; *Jansen v. Grimshaw*, 26 Ill. App. 287.

Reed & Dougherty, for respondent.

When Harmon's deposition was offered in evidence the objection was made that, "it does not appear that Mr. Harmon is not in the city and cannot be procured." Plaintiff then made statement to the court and counsel that "Harmon is out of the state." With this statement the court and counsel were satisfied and no question was made at that time.

The jury had evidence upon which to base a verdict and the court will find upon reading the settled case that this point of defendant is not sustained upon the whole evidence. The testimony of Harmon is that the partnership was never dissolved and that no notice of dissolution was ever given, that plaintiff loaned the money to the firm and they used it in paying company debts. This is uncontradicted. Sherburne does not know what the money was used for. He says: "I cannot recall any circumstances concerning the signing of that note."

If the making of the note was a partnership transaction as the jury must have found, and plaintiff knew that they were partners, then some notice or knowledge of the dissolution of the partnership was necessary to enable either partner to take advantage of the statute of limitations. A partial payment by a partner after the dissolution of the firm prevents a bar of the statute of limitations, providing a creditor has no notice of the dissolution. *Tappan v. Kimball*, 30 N. H. 136; *Kenniston v. Avery*, 16 N. H. 117; *Sage v. Esign*, 2 Allen, 245; *Buxton v. Edwards*, 134 Mass. 567; *Gates v. Fisk*, 45 Mich. 522; *National Bank v. Norton*, 1 Hill, 572; *Leithauser v. Baumeister*, 47 Minn. 151; *Agnew v. Merritt*, 10 Minn. 308.

To avoid the bar of the statute of limitations as to others by payment by one of several makers of a note, it may be shown by parol that the makers were in fact partners when they signed the note, treated it as a partnership debt and used the money as partnership funds. Payment by one of several makers who were in fact partners when they signed the note will take it out of the statute as to others, if the note was a partnership debt and payment was made out of partnership funds. *Mix v. Shattuck*, 50 Vt. 421; *Mourroe v. Williams*, 35 S. C. 572; *Williams v. Journal P. Co.*, 43 Minn. 537; *Rowell v. Oleson*, 32 Minn. 288; *Metzner v. Baldwin*, 11 Minn. 150; *Markham v. Buckingham*, 21 Ia. 494; *Whitman v. Keith*, 18 Ohio St. 134; *Weide v. Porter*, 22 Minn. 429.

The burden of proof of notice of dissolution is upon the partner desiring to establish the notice and a notice is necessary to terminate the agency of each partner. Making payments is included in the power to wind up a partnership, and such an act by a partner in his capacity as an agent for the purpose of winding up the business is effectual to prolong the time as against the copartners. *Beardsley v. Hall*, 36 Conn. 270; *Bissell v. Adams*, 35 Conn. 299; *Van Staden v. Kline*, 64 Ia. 180; *Greenleaf v. Quincy*, 11 Me. 11; *White v. Hale*, 3 Pick. 291; *McClurg v. Howard*, 45 Mo. 365; *Casebolt v. Ackerman*, 46 N. J. Law, 169; *Willis v. Hill*, 2 Dev. & B. 231; *Houser v. Irvine*, 3 Watts & S. 345; *Fisher v. Tucker*, 1 McCord, Eq. 169; 3 McCord, Eq. 278; *Turner v. Ross*, 1 R. I. 88.

MITCHELL, J. We are inclined to the opinion that the question whether the note in suit was executed during the existence of the copartnership between defendants, and for partnership purposes, was for the jury; although it must be admitted that the evidence tended very strongly to show that the partnership was dissolved the previous June, when it sold out its mercantile business, and that thereafter it existed only for the purpose of winding up, by collecting and distributing its assets and paying its debts.

The fact that the note was signed by defendants in their individual names, and not in the firm name, although an item of evidence of some weight, was not controlling or conclusive.

There was, however, ample evidence to justify, if not to require,

a finding that the partnership was dissolved prior to 1886, the date of the first payment on the note relied on to prevent the bar of the statute of limitations. The note is confessedly barred as to Sherburne, unless taken out of the statute by payments made by Harmon; and there is evidence that plaintiff had no notice or knowledge of the dissolution of the partnership when these payments were received, and but for them the note would have been barred.

This state of facts presents the principal legal question in the case, viz. whether a partial payment by one of the firm that contracted the debt, made after dissolution of the partnership, will prevent the bar of the statute as to the other partners, in favor of a creditor who has had dealings with the firm, and has had no notice of its dissolution.

It is the settled law of this state that one of several joint debtors cannot, from the mere fact of the existence of a joint liability, by his own several act or agreement, extend or renew the liability as against his co-obligors. *Willoughby v. Irish*, 35 Minn. 63, (27 N. W. 379.)

The power of one partner to bind the others rests upon the principle that each partner is, in contemplation of law, the general and accredited agent of the whole firm in all matters within the scope of the partnership business; and it follows that this power terminates with the dissolution of the copartnership.

And many cases can be found which contain the general and unqualified statement that an acknowledgment of a partnership debt by one partner after dissolution will not prevent the statute from running as to the other partners.

These statements are usually based on the want of authority, which terminates with dissolution. In most of these cases it will be found that the creditor had notice of the dissolution, and, as applied to such a state of facts, the statement is undoubtedly correct. But in some instances it would seem that the court had not presently in mind the important fact that, under some circumstances, notice of dissolution is necessary to terminate the partnership as to third parties, or, more accurately speaking, to terminate the power of one partner to bind the others. This is frequently illustrated by cases where those who have had previous dealings with the firm give new credits to the firm without notice of its dissolution. It is said

in such cases that the person has parted with something of value on the credit of the firm, whereas in the case of a part payment of an existing partnership debt the creditor parts with nothing, but in fact receives something.

It seems to us that this is more plausible than sound. We cannot see that the equity of one who sells goods on the credit of a firm which he supposes still to exist is any stronger than that of a creditor who, having no knowledge of the dissolution, has refrained from reducing his claim to judgment, in reliance on part payments as a protection from the statute.

We think that, upon principle as well as authority, the correct rules are as follows: As between themselves, neither partner after dissolution has any power to act for or bind the other. Neither are they capable of doing so with respect to others with whom the firm had previous dealings, who had received notice of the dissolution; nor with respect to those with whom they had not previously dealt as partners at least after public notice of dissolution, if at all. But with respect to those with whom they had previously dealt as partners, and who had not notice or knowledge of the dissolution, they are still, in the eye of the law, partners, capable of binding one another in matters within the scope of the partnership business. Within the principle of this last proposition, a partial payment by a partner after dissolution of the firm will prevent the bar of the statute as to the other partners, in favor of a creditor who has had dealings with the firm, and has had no notice of its dissolution. *Kenniston v. Avery*, 16 N. H. 117; *Tappan v. Kimball*, 30 N. H. 136; *Sage v. Ensign*, 2 Allen, 245; *Buxton v. Edwards*, 134 Mass. 567; *Gates v. Fisk*, 45 Mich. 522, (8 N. W. 558;) *Clement v. Clement*, 69 Wis. 599, (35 N. W. 17.) See, also, *Leithauser v. Baumeister*, 47 Minn. 151, (49 N. W. 660.)

Counsel for appellant is in error in saying that these authorities are from jurisdictions committed to the doctrine of *Whitcomb v. Whiting*, 2 Doug. 652, that a payment of one joint debtor will prevent the bar of the statute as to the others. Most, if not all, of them are from states where, either by statute or by judicial decision, the law is the same as laid down in *Willoughby v. Irish*, *supra*. We have found no case to the contrary, except *Tate v. Clements*, 16 Fla. 339, where the question was directly involved, and presently in the mind

of the court. We are therefore of opinion that the charge of the court was a correct exposition of the law.

But, according to the doctrine of *Atkinson v. Nash*, 56 Minn. 472, (58 N. W. 39,) the court erred in admitting the deposition of Harmon, taken pursuant to 1878 G. S. ch. 73, § 36, as amended by Laws 1885, ch. 53, there being no showing that a cause existed and still exists for taking and using the same. We do not think the record justifies the contention of respondent's counsel that appellant's counsel accepted his statement on the trial that Harmon was "not in the city" as a sufficient showing. For this error, the order denying a new trial is reversed.

BUCK and CANTY, JJ., took no part.

(Opinion published 59 N. W. 816.)

In re STATE BANK, Insolvent.

Argued May 31, 1894. Affirmed May 25, 1894.

No. 8302.

57 361
72 338

Division of opinion between two Judges of the District Court in Hennepin County.

Where two judges of the District Court in Hennepin county sit together in the hearing of a cause, if there is a division of opinion, the opinion of the judge senior in office is the opinion of the court.

Payment of fees of Assignee of insolvent debtor.

Where an assignee in insolvency has failed to comply with the order of the court to turn over all money and property in his hands to his successor, it is not error for the court to refuse to pass upon and allow his account for services and disbursements until he complies with the order.

Assignee's fees adjusted by the court from its knowledge of his services as its officer.

In passing upon the account of the assignee, the court is not confined to the evidence formally introduced on the hearing, but, in determining the reasonableness of the account, may use his own personal knowledge of what has been done by the assignee in the proceedings, and of the general nature and extent of his services.

Appeal by George H. Fletcher former assignee of the insolvent State Bank of Minneapolis, from an order of the District Court of Hennepin County, *Henry G. Hicks* and *Charles M. Pond, JJ.*, made November 25, 1893, allowing in part and disallowing the residue of his final account as such assignee.

On June 27, 1893, the State Bank made an assignment of its property under Laws 1881, ch. 148, as amended to George H. Fletcher in trust for its creditors. He accepted the trust, gave bond and discharged the duties of that office until August 12, 1893, when he resigned. His resignation was accepted at once and he was ordered to turn over to his successor all property and money in his hands. On August 17, 1893, William J. Hahn was appointed in his stead and accepted the trust. Fletcher filed his final account as assignee on August 23, 1893, and obtained an order that W. J. Hahn his successor and all parties interested show cause, if any they had, on September 23, 1893, why his report and account should not be approved and allowed. Notice of the hearing was ordered to be given by mailing a printed copy of the order to all creditors named in the schedule of liabilities of the bank. About one hundred and fifty of the creditors by their attorney appeared and filed a verified statement of facts and objections to the account and various items thereof. The hearing was adjourned from time to time until November 25, 1893, when the report and account and the objections thereto were heard before Judges *Henry G. Hicks* and *Charles M. Pond* sitting together at Special Term. Oral evidence was heard by them and reduced to writing, signed and verified by the witnesses and filed with the clerk. The judges also in passing upon items of the account considered and acted upon facts observed by them in directing the assignee, an officer of the court, acting under its authority.

The court allowed for postage, rent, stamped envelopes, printing notices, clerk hire, sheriff's and clerk's fees, but rejected traveling expenses, stenographer's charges and copying. Fletcher reported that he had received from the insolvent and collected on claims a total of \$8,643.14 and had on August 22, 1893, paid \$5,000 thereof to Hahn his successor, but had retained the residue to cover his charges, attorney's fees and disbursements. He claimed \$1,500 for his services and \$1.080 for his attorney's fees and \$851.38 for disburse-

ments. The court, citing *In re Shotwell*, 49 Minn. 170, reduced the assignee's fees to the percentage allowed by Laws 1889, ch. 30, § 8. on moneys actually collected, viz. to \$368.62, and reduced the attorney's fees to \$400, and the disbursements to \$412.44. The two Judges disagreed upon some of the items and the order was consequently signed only by *Hicks*, the Judge senior in office. Laws 1881 (Ex. Sess.) ch. 84, § 3. Fletcher was indebted to the bank at the time of its assignment, on his notes to it over \$5,000 and in view of this fact the order provided that; "The balance of the funds belonging to the estate of the insolvent bank now in the hands of the said George H. Fletcher be, within five days after notice of this order, paid over to William J. Hahn, Esq., the present assignee of said insolvent bank, and that until such payment is made in conformity with this order, no allowance whatever will be made to the said George H. Fletcher for his fees, disbursements and expenses incurred while acting as such assignee as aforesaid." Fletcher appeals from the order, assuming it to be final, not interlocutory. 1878 G. S. ch. 86, § 8, subd. 6.

J. F. McGee, for appellant.

John W. Arcander, for respondents.

MITCHELL, J. The short facts are that on June 27th the State Bank of Minneapolis, being insolvent, made an assignment for the benefit of its creditors to one Fletcher, a stockholder and director of the bank, and a debtor to it in the sum of over \$5,000, of which \$1,500 was overdue. Fletcher entered upon the duties of his office, as assignee, June 30th. On August 12th he resigned, and on August 17th the court made an order appointing his successor, and requiring him to deliver over to such successor all property or money of the bank in his hands. At this time, Fletcher had in his hands \$8,643.14, of which over \$6,200 was practically money which the bank had on hand at the time of the assignment. The remainder was money which Fletcher had collected by his own exertions. On August 22d, Fletcher paid over to his successor \$5,000. and no more. On or about August 24th, he filed his report, in which he claimed for his services and disbursements, during the month and a half he had acted as assignee, the sum of \$3,431.38. A large number of the creditors of the bank objected to the allowance of

any part of the account, for the reason, among others, that he was in contempt of court, in not obeying its order to pay over to his successor all the money in his hands. They also objected to numerous items of the account, either as unreasonable in amount, or as not being proper disbursements.

Judge Hicks, who held the special term, designated Judge Pond as to the judge to hear the matter. Judge Pond refused to hear it unless Judge Hicks would sit with him. The two judges sat together on the hearing; Judge Hicks, the senior in office, presiding, and rendering the decision, and making the order of the court. Judge Pond filed a memorandum opinion dissenting from some of the views of Judge Hicks, but made no order. The order filed by Judge Hicks required Fletcher to pay over to his successor the full balance of \$3,643.14 remaining in his hands; refused to allow any of his account, unconditionally, because he had failed to obey the original order of the court, but provisionally allowed such part of it as the court found reasonable and just, to wit, \$1,238.96, in case he first paid over the moneys in his hands to his successor. The order further provided that the amount thus allowed should be applied on Fletcher's indebtedness to the bank. Although this part of the order is assigned as error, yet, not being included in the points and authorities relied on, it will be deemed waived.

1. Waiving the question of its appealability, we are of the opinion that the order filed by Judge Hicks was the order of the court.

It is immaterial that the matter was originally assigned to Judge Pond for hearing. The fact was that it was heard by the two judges together, and, if there was any division of opinion, the opinion of the presiding judge (the senior in office) would be the opinion of the court. Laws 1881 (Ex. Sess.) ch. 84, § 3; Laws 1889, ch. 152, § 1. If his order is not the order of the court, then there is nothing to appeal from, because Judge Pond never made any order.

2. The court had a right to insist that Fletcher should first obey its previous order to pay over all the money in his hands to his successor, before it would allow his claim for services and disbursements. As well said by the learned judge, it is all wrong for an assignee to retain out of its assets what he claims to be due him, after he has been ordered to pay over all that is in his hands, and before his account for fees has been passed upon by the court. His

place was to pay over everything to his successor, as ordered, and then present his account to the court for allowance and payment.

3. It is impracticable to go in detail over the different items in the account disallowed in whole or in part. We have examined them, and fail to find any error in the action of the court. The evidence, which was in the form of affidavits, was conflicting. Moreover, the correctness of the conclusions of the court as to the allowance of the assignee's account is not to be determined, as in ordinary cases, exclusively upon the evidence formally introduced on the hearing. The court in which the proceedings were pending has personal knowledge of much that has been done by the assignee, and of the general nature and extent of his service; and this knowledge, we think, he may rightfully use, in determining what would be a fair compensation. A bill of over \$3,400 for services and disbursements for less than a month and a half seems, in the light of all that appears to have been done, a very extravagant one. The court was justified in pruning it down very materially, and, upon the whole, we do not think any injustice has been done to appellant.

Order affirmed.

Buck, J., absent, sick, took no part.

(Opinion published 59 N. W. 315.)

THOMAS G. NEAL vs. NORTHERN PACIFIC RAILROAD CO.

Argued May 15, 1894. Reversed May 25, 1894.

No. 8672.

Telegraph lineman and roadbed repairing crew fellow servants.

Defendant had a crew of men, under the direction of a foreman, employed in blasting and quarrying stone along the line of its road, to be used in repairing its roadbed. The blasting of rock frequently broke down the defendant's telegraph poles and wires along its road in the vicinity of the quarry. The plaintiff, a lineman in the employment of defendant, who received his orders from defendant's superintendent of telegraph, was engaged in repairing the telegraph line whenever broken down by the blasting. Any assistance required by him was obtained from the quarry crew, on whom he had a right to call for aid. A tele-

57	365
160	481
160	441
57	365
66	390

graph pole having been thrown down by a blast, plaintiff and one of the quarry men descended to the lower side of the railroad embankment to repair it, and, while they were thus engaged, one of the quarry men negligently rolled a rock down the embankment, and injured the plaintiff. *Held*, that the plaintiff and the quarry crew were fellow servants within the rule which exempts the master from liability for injuries sustained by one servant through the negligence of another.

Appeal by defendant, Northern Pacific Railroad Company, from an order of the District Court of Ramsey County, *John W. Willis, J.*, made October 25, 1893, denying its motion for a new trial after verdict for plaintiff, Thomas G. Neal, for \$18,525.

J. H. Mitchell, Jr., T. R. Selmes and C. D. & Thos. D. O'Brien, for appellant.

The conclusion of the jury that the plaintiff and the quarry crew were not fellow servants has no possible weight, for it is not left to a jury to define who are or who are not fellow servants. When the facts are in conflict and when in the law upon one state of facts the relation of fellow servant may exist, while upon the other side it does not exist, then the jury are at liberty to find the fact and upon that finding the law bases its conclusion as to the legal relation of the parties. But here there was no conflict of fact. The plaintiff's statement of the situation so far as his relation to the other men was concerned is absolutely accepted, and there is no pretense upon the part of the plaintiff that Stout, the boss in charge of the work, was a vice principal, or that if he was his negligence in anywise contributed to the injury. In view of the entire concurrence of all of the authorities upon this point we content ourselves with a reference to some of them. *Lindvall v. Woods*, 41 Minn. 212; *Bergquist v. City of Minneapolis*, 42 Minn. 471; *Fraser v. Red River Lumber Co.*, 45 Minn. 235; *Marsh v. Herman*, 47 Minn. 537; *Brown v. Winona & St. P. R. Co.*, 27 Minn. 162; *Olson v. St. Paul, M. & M. Ry. Co.*, 38 Minn. 117; *Foster v. Minnesota Cent. Ry. Co.*, 14 Minn. 360; *Fraker v. St. Paul, M. & M. Ry. Co.*, 32 Minn. 54; *Collins v. St. Paul & S. C. R. Co.*, 30 Minn. 31; *Connelly v. Minneapolis E. Ry. Co.*, 38 Minn. 80; *Brown v. Minneapolis & St. L. Ry. Co.*, 31 Minn. 553; *Roberts v. Chicago, St. P., M. & O. Ry. Co.*, 33 Minn. 218; *Gonsior v. Minneapolis & St. L. Ry. Co.*, 36 Minn. 385;

Chamberlain v. Milwaukee & M. Ry. Co., 7 Wis. 425; *Moseley v. Chamberlain*, 18 Wis. 700; *Cooper v. Milwaukee & P. R. Co.*, 23 Wis. 668; *Howland v. Milwaukee, Lake Shore & W. Ry. Co.*, 54 Wis. 226; *Dwyer v. American Exp. Co.*, 55 Wis. 453; *Blazinski v. Perkins*, 77 Wis. 9; *Johnson v. Ashland Water Co.*, 77 Wis. 51; *Peschal v. Chicago, M. & St. P. Ry. Co.*, 62 Wis. 338; *Chapman v. Erie Ry. Co.*, 55 N. Y. 579; *Dewey v. Detroit, G. H. & M. Ry. Co.*, 97 Mich. 329; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368; *Potter v. New York Cent. & H. R. R. Co.*, 136 N. Y. 77; *Cornelison v. Eastern R. Co.*, 50 Minn. 23; *Stutz v. Armour*, 84 Wis. 623; *Schaible v. Lake Shore & M. S. Ry. Co.*, 97 Mich. 318.

M. E. Clapp and McDonald & Barnard, for respondent.

At the time of the accident the plaintiff was in the employ of the Northern Pacific Railroad Company as a telegraph line repairer having charge of a division of telegraph line extending from Palmer to Ellensburg. It consisted of four wires, one used by the train dispatcher, and the quadruplex wire. At the time of the accident the dispatcher's wire had been repaired and plaintiff was in the act of repairing the others. The railroad company was engaged in cutting out rock for ballasting. The rock was to be hauled some distance from the point at which it was gotten out. The crew in the act of blasting knocked the wires down. While engaged in repairing or replacing the wires plaintiff was injured by a rock rolling down upon him occasioned by the carelessness of one of the blasting crew. The men engaged in blasting were under the control of a Mr. Stout who had no control whatever over the plaintiff, he being at work under the instructions of one Mason, the assistant general superintendent of the telegraph line department. Without reviewing at any length the labyrinth of cases upon this question, we submit that plaintiff and the blasting crew were not fellow servants. *Chicago & N. W. Ry. Co. v. Moranda*, 93 Ill. 302; *Hobson v. New Mexico & A. Ry. Co.*, 28 Am. & Eng. Railroad Cas. 360; *Dixon v. Chicago & A. R. Co.*, 109 Mo. 413.

The verdict was not excessive. *Flanders v. Chicago, M., St. P. & O. Ry. Co.*, 51 Minn. 193; *Ehrman v. Brooklyn City R. Co.*, 131 N. Y. 576; *Worthen v. Grand Trunk R. Co.*, 125 Mass. 99.

MITCHELL, J. This action was brought to recover damages for personal injuries caused by the alleged negligence of the defendant. The plaintiff was in the employment of the defendant as telegraph lineman, his duty being to repair defendant's telegraph line at such points as he might be directed. He received his orders from defendant's assistant superintendent of telegraph.

On, and for some time prior to, the date of the accident, the defendant had a crew of men, under the direction of a foreman, engaged in blasting and quarrying rock upon the line of its road in the vicinity of Canton, Wash., for the purpose of using the rock in riprapping injured portions of its line at points some distance from the place where the rock was procured. The place is in a mountainous district along a river, the roadbed being excavated out of the side of the mountain, some little distance above the stream, so that on the upper side of the track there was a steep rock cliff, and below the track a steep decline down towards the river. Defendant's telegraph line was constructed fifteen or sixteen feet below the track, down the embankment. On account of this conformation of the ground, it followed that, when rock was blasted from the cliff on the upper side of the track, detached pieces were thrown across the road down the bank below, which frequently broke down the telegraph poles and lines. After a blast was fired off, it was the duty of the quarrying crew to pile up the loosened and detached rock alongside the track, to be hauled by trains to the place where the rocks were to be used for repairs.

This work had been going on for some three weeks, during which time the plaintiff had been engaged in repairing, whenever necessary, the telegraph line when broken down or injured by the blasting. Any assistance required by him in doing this work he obtained from the quarry crew, upon whom he had a right to call for aid. On the day in question he accompanied the quarry crew to the place where this work was being carried on.

A blast having been fired off, a quantity of stone was thrown upon the track, while some was hurled down the bank, knocking down the wire and a telegraph pole. The plaintiff, in company with one of the quarry gang, proceeded to repair the wire and pole, while the remainder of the men appear to have been engaged in removing from the track, and piling up, the rock which had been detached

by the blast. While plaintiff was thus engaged, a large rock rolled against his leg, so injuring it as to render necessary amputation below the knee. So far there is no conflict whatever in the evidence. The only dispute is as to the manner in which the accident occurred. Plaintiff's claim was that one of the quarry crew pried the rock off the railroad track, and rolled it down the embankment, while defendant's contention was that the rock had been previously thrown down the embankment by the blast, and lodged against the foot of the pole which plaintiff was readjusting, and that it was his own efforts to restore the pole which caused the rock to roll against his leg. Which party was right on this point was a question for the jury. The only legal question in the case is whether, on the facts, the plaintiff and the members of the quarry crew were fellow servants within the rule which exempts the master from liability for injuries sustained by one servant through the negligence of another.

The trial court left this question to the jury. As the facts were undisputed, and showed precisely what the respective duties of the plaintiff and of the quarry crew were, and what relation they bore to each other, the question was one of law, and should have been decided by the court. But if, as a matter of law, the plaintiff and the quarry crew were not fellow servants within the meaning of the rule, the error of the trial court in leaving the question to the jury would not be prejudicial to the defendant.

Ever since the "common employment" doctrine was announced in *Priestley v. Fowler*, 3 Mees. & W. 1, courts and text writers have been attempting to lay down some formula or test by which to determine what servants of a common master are fellow servants within the rule that exempts the master from liability. The books abound in statements that they must be "engaged in the same common pursuit, under the same general control," or "engaged in the same general business, though it may be in different grades or departments of it," or "engaged in the same general employment, working to accomplish the same general end, though it may be in different departments or grades of it." Of course, such definitions are very unsatisfactory, unless we are told what is meant by the expressions "the same common pursuit," "the same general business," etc., for upon the meaning to be attached to these terms the entire question depends.

A few western states, adopting what is termed the "consociation
v.57M.—24

doctrine," hold, in substance, that only those are fellow servants, within the rule, who work side by side, performing the same or similar duties. This doctrine, however, has received but little favor in the courts of either England or America, and, in our opinion, proceeds upon an erroneous theory as to the reason for the rule exempting the master from liability.

At the other extreme may be found some authorities which seem to include within the category of fellow servants all employes of the same common master, however essentially dissimilar and disconnected their occupations. Neither has this view been received with any general favor. But ever since the leading and pioneer case of *Farwell v. Boston & Worcester R. Co.*, 4 Metc. (Mass.) 49, the overwhelming majority of the authorities have repudiated the "same department" or "consociation" theory, and have held that the rule is not confined to the case of servants working in company at the same or similar duties, and having opportunity to control or influence the conduct of each other, but extends as well (there being no question of vice principal involved) to those who derive their authority and compensation from the same source, are engaged in the same general business (though in different departments or grades of it), working to accomplish the same general end.

This has been the view uniformly entertained and expressed, although perhaps not always correctly applied, by this court, from *Foster v. Minnesota Cent. Ry. Co.*, 14 Minn. 360, (Gil. 277), down to our latest utterances on this subject. We have never attempted to lay down any cast-iron formula, except in general terms, by which all cases shall be determined, and we shall not now dare to attempt what no court has yet succeeded in doing. But we are satisfied that, while we have never passed upon a case with precisely the present facts, yet according to the unbroken line of decisions of this court, and the great weight of authority elsewhere, it must be held that the plaintiff and the quarry crew were fellow servants.

That they were all servants of the same master is of course conceded. And, although engaged in different lines of duty, they were all engaged in the same general business, working to accomplish the same general end, to wit, the maintenance and repair of defendant's railway,—one, in getting out stone to repair the roadbed; the other, in repairing the telegraph line, which was as essentially a

part of defendant's railway, for purposes of actual operation. as were the ties and iron. Had plaintiff been a track repairer, and been injured in the manner he was, there could have been no doubt under our decisions but that he and the quarry crew would have been fellow servants. But we can see no difference, in principle, between the relation which plaintiff bore and that which a track repairer would have borne to the general business of the master or to the quarry crew.

It is also to be observed that it was not a case where there could have been any interference or interposition on the part of the master to protect the plaintiff from the acts of the quarry crew while at work, or where he had a right to expect any such interposition. They were working side by side, and, to a certain extent, together, and he was in just as good, or better, position to protect himself as his employer was to do it for him. Indeed, we are inclined to think that even under the "consociation doctrine," at least as applied in some of the states which have accepted it, plaintiff and the quarry crew would be held to be fellow servants.

Order reversed.

BUCK, J., absent, sick, took no part.

CANTY, J. I agree with the result in this case, but not with the rule derived from *Farwell v. Boston & Worcester R. Co.*, 4 Metc. (Mass.) 49, that the master is never liable for an injury to a servant in one department caused by the negligence of a servant in another department. In my opinion, the doctrine laid down by the greater number of the courts of the states and the courts of England that all who are engaged in the same common service, including all grades, classes, and departments subject to the same general control, are fellow servants, is not always correct.

On the other hand, the doctrine that servants not consociated are not fellow servants, as held in Illinois, Missouri, and one or two other states, is not always the correct rule. The rule which makes consociation the only test, as held by these courts, it seems to me, is as unsound as the other rule, which wholly excludes it as an element to be considered in determining who are fellow servants.

Where the servant in one department of the general business is so situated that he cannot have the knowledge of the acts and omis-

sions of the servants in another department necessary for his protection, but some common or intermediate authority over both departments can, by the exercise of reasonable care, obtain such knowledge, and by making the proper use of it protect such servant, then the exercise of such intermediate authority is a duty which devolves on the master, and one which he cannot delegate, and the failure to exercise which makes him liable to the servant injured. In such a case the master's right hand should know what his left hand is doing. But where no such intermediate supervision is practicable, or the servant in one department is in as good a position to observe and know of the negligent acts or omissions of the servants in the other department as any such intermediate or common overseer can be, and as well able to protect himself as such overseer is to protect him from the consequences of such acts or omissions, then the fellow-servant rule applies, and he must take care of himself. Examples of cases in which the master should be held liable for failure to perform the duty of common overseer of two departments are such as *Madden v. Chesapeake & Ohio Ry. Co.*, 28 W. Va. 610; *Ragsdale v. Northern Pac. R. Co.*, 42 Fed. 383; *Cooper v. Mullins*, 30 Ga. 150; *Smith v. Wabash, St. L. & Pac. Ry. Co.*, 92 Mo. 359, (4 S. W. 129,)—where trains on the same track came in collision with each other, whereby the servant was injured by reason of the want of an intermediate overseer, or by reason of the negligence of the intermediate overseer to use such proper and reasonable precautions as would have kept the trains apart.

Examples of cases where such interposition by the master is not practicable are such as *Toledo, W. & W. Ry. Co. v. O'Connor*, 77 Ill. 391; *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302; *Sullivan v. Missouri Pac. Ry. Co.*, 97 Mo. 113, (10 S. W. 852;) *Parker v. Hannibal & St. Jo. R. Co.*, 109 Mo. 362, (19 S. W. 1119,)—where the section men, or others working on or about the track, were injured by the engineer running the train. In the first class of cases the servant was absolutely powerless to protect himself, while, to a greater or less degree, the master was in a position to protect him.

In the last class of cases these conditions were reversed, and the immediate interposition of the master was not practicable, while the servant was in a position, to a greater or less degree, to protect

himself. Yet, by the consociation rule applied in those states, this distinction was ignored, and the master was held liable in all of these cases.

Again, it was held by one of the same courts, applying the same rule, that a brakeman on one train was a fellow servant with the fireman on another train, and that the latter could not recover for an injury received in a collision caused by the negligence of the former, where the train dispatcher had run the rear train ahead of time without notice to the crew of the forward train. *Relyea v. Kansas City, Ft. S. & G. R. Co.*, 112 Mo. 86, (20 S. W. 480.)

It was also held by the same court that where a brakeman on one train was injured by the negligence of the crew of another train in leaving a car on a side track, dangerously near the main track, at a regular station, where the car so remained about ten or twelve hours, they were all fellow servants, and the master was not liable. *Schaub v. Hannibal & St. Jo. R. Co.*, 106 Mo. 74, (16 S. W. 924.)

In each of these cases there was more or less opportunity for the interposition of the master, while the servant was powerless to protect himself. In the first case the injury might have been attributed to the negligent act of the master in running the rear train ahead of time, and in the last case on his negligent omission in failing, after a reasonable time, to discover that the car on the side track was dangerously near the main track. I have already discussed this question much further than the case now before the court calls for, and, in applying these principles to this case, it is plain that the lineman was in a better position to protect himself than any such intermediate overseer could be to protect him, that the interposition of such intermediate or common overseer between him and the quarrymen working in the other department was not practicable, and that he and they were therefore fellow servants.

(Opinions published 59 N. W. 312.)

BANK OF COMMERCE vs. FRED. W. SMITH et al.

Argued by appellant, submitted on brief by respondent, May 22, 1894. **Affirmed**
May 25, 1894.

No. 8694.

Errors of jury in computing amount of verdict, how reviewed.

Where the error or mistake complained of is not that of the court itself, but of the jury or clerk, it cannot be raised on appeal to this court without first applying to the trial court to have the error corrected. Rule applied to a case where the amount of the verdict was slightly in excess of the amount claimed in the complaint.

A several judgment against one of the defendants, when proper.

In an action against the maker, and the guarantors of payment, of a promissory note, the plaintiff may enter a several judgment on a verdict against the maker without waiting until the trial of the issues with the other defendants.

Appeal by Fred W. Smith, one of the defendants, from a judgment of the District Court of St. Louis County, *J. D. Ensign, J.*, entered November 25, 1893.

On June 26, 1893, the defendant Fred W. Smith made and delivered to the plaintiff the Bank of Commerce of West Superior Wis., his promissory note whereby he promised to pay to its order ninety days thereafter \$1,750 with interest at the rate of ten per cent per annum. At the same time the defendants William C. Sherwood and Adeline Smith by writing indorsed on the note for value received, guaranteed its payment. The note was not paid and the Bank brought this action upon it against the maker and guarantors. Fred W. Smith answered separately on October 24, 1893, denying all the allegations of the complaint. The issues with him were noticed for trial and were tried November 17, 1893. The other defendants did not answer until November 13, 1893. This was not in time to permit the issues with them to be noticed and brought to trial at that term. On the trial plaintiff introduced the note in evidence. Defendant, Fred W. Smith, did not appear or offer any evidence. The jury returned a verdict for the plaintiff for \$1,832.31. The amount actually due on the note at the date of the verdict November 17, 1893, was but \$1,818.54. The plaintiff's costs

were taxed November 25, 1893, at \$20.80, interest on the verdict was \$2.82. Judgment was entered that day against Fred W. Smith only for \$1,855.93, damages and costs. He did not move to correct the verdict or judgment or ask for a new trial, but on November 28, 1893, appealed from the judgment.

Smith McMahon & Mitchell, for appellant.

Plaintiff in his recovery is limited to the amount stated in his declaration or complaint and a verdict for more is not good. *Elfelt v. Smith*, 1 Minn. 125; *Eaton v. Caldwell*, 3 Minn. 134; *Dox v. Dey*, 3 Wend. 356; *Fish v. Dodge*, 4 Denio, 311; *Barber v. Kennedy*, 18 Minn. 216; *Prince v. Farrell*, 32 Minn. 293; *Minnesota L. O. Co. v. Maginnis*, 32 Minn. 193.

An excessive verdict, if the excess is not remitted in the trial court, is error and the judgment will be reversed or modified. *Stickney v. Bronson*, 5 Minn. 215; *Ward v. Haws*, 5 Minn. 440; *Seeman v. Feeney*, 19 Minn. 79; *Fish v. Dodge*, 4 Denio, 311; *Dox v. Dey*, 3 Wend. 356; *Elfelt v. Smith*, 1 Minn. 125.

The error of an excessive verdict and judgment thereon can be taken advantage of on an appeal from the judgment and need not first be raised in the court below. *Babcock v. Sanborn*, 3 Minn. 141; *Reynolds v. La Crosse & M. P. Co.*, 10 Minn. 178; *Brown v. Lawler*, 21 Minn. 327.

An action having been brought against the defendants jointly, a judgment against one before the issues were disposed of as to the others was irregular and should be reversed. 1878 G. S. ch. 66, § 265; *Bacon v. Comstock*, 11 How. Pr. 197; *Brown v. Richardson*, 4 Robt. 603.

A. E. McManus, for respondent.

It was the duty of the appellant to make his objection to the excessive verdict in the court below and give respondent and that court an opportunity to correct the record by remitting the excess. *Scott v. Minneapolis, St. P. & S. Ste. M. Ry. Co.*, 42 Minn. 179; *Eaton v. Caldwell*, 3 Minn. 134; *Oldenberg v. Devine*, 40 Minn. 409; *Lundberg v. Single Men's End. Ass'n.*, 41 Minn. 508; *Knappen v. Freeman*, 47 Minn. 491.

1878 G. S. ch. 66, § 265, gives the right to enter a several judgment where the same is proper and surely the appellant does not claim that this was an action in which a separate judgment was improper. *Patton v. Shanklin*, 14 B. Mon. 15; *Sears v. McGrew*, 10 Oregon, 48; *Croasdell v. Tallant*, 83 Pa. St. 193.

MITCHELL, J. This action was brought against Smith as maker, and two other as guarantors of the payment, of a promissory note. Each of the defendants interposed a separate answer, consisting in effect of a general denial. The cause was tried upon the issues between plaintiff and Smith, and a verdict rendered for the plaintiff, leaving the issues between plaintiff and the other defendants undisposed of. Judgment was rendered against Smith upon the verdict. The verdict was for a few dollars more than the amount claimed in the complaint. Without having made any motion for a new trial, or otherwise calling the attention of the trial court to this alleged excess in the amount of the verdict, Smith appeals from the judgment.

Whatever vacillation or uncertainty on the subject there may have been in the earlier decisions of this court, its uniform and inflexible rule, for many years, has been that where the error or mistake is not that of the court itself, but of the jury or the clerk, application must be made, in the first instance, to the trial court to correct it. This has been held in cases where the verdict was claimed not to be justified by the evidence; also, where the judgment entered by the clerk was not in accordance with the verdict or findings. The propriety of this rule is very apparent, because, presumably, if the trial court's attention was called to the matter, it would correct the error; and to allow a party to raise these questions on appeal to this court, without first applying to the trial court, would be to allow him to omit to resort to a very speedy and inexpensive remedy, which is very much in the nature of an intermediate appeal.

The evidence is not returned, and hence we do not know how the amount of the verdict was arrived at. Very probably the jury may have made a mistake in computing interest on the note. If so, the trial court would, on proper application, have corrected it by requiring the plaintiff to remit the excess. The point is not available on this appeal.

There is nothing in the point that it was error to enter a several judgment against the appellant. It was a case where a several judgment was entirely proper. Plaintiff might have sued appellant separately, and the fact that he elected to sue all the defendants in one action did not preclude him from taking a several judgment against appellant without waiting the determination of the issues as to the other defendants. It is not necessary to decide whether this could have been done without leave of the court, had all the defendants borne the same relation to the note, and been jointly and severally liable. The relations of the maker and guarantor to a note are entirely different, their agreements being entirely separate and independent, and it is only by virtue of statute that they can be included in the same action. *Hammel v. Beardsley*, 31 Minn. 314, (17 N. W. 858.)

Judgment affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 811.)

In re JOHN WARD'S ESTATE.

Argued May 16, 1894. Reversed May 25, 1894.

No. 8766.

Sale on condition subsequent.

A sale of personal property on condition that the vendee may return it, in a certain contingency, becomes absolute, if the vendee, in the mean time, disables himself from performing the condition, as by selling or mortgaging the property.

Appeal by William Willford, Executor of the will of John Ward, deceased, from an order of the District Court of Fillmore County, *John Whytock*, J., made February 16, 1894, denying his motion for a new trial.

On December 22, 1888, John Ward, deceased, sold and delivered to claimant, Lawrence Lynch of Houston County, an imported English Shire stallion called Brown George for \$1,500. Ward agreed

that in case the horse proved barren with careful handling in two seasons trial he would furnish Lynch another imported or pure bred stallion of equal value on return to him of Brown George in good health and condition. On January 20, 1891, John Ward died testate being a resident of Fillmore County. His will was proved and admitted to record in that county and in April letters testamentary issued to William Willford. On October 21, 1891, Lynch presented in the Probate Court a claim against the estate for \$1,500 damages for breach of the contract, claiming the horse had proved barren and that another had not been furnished on demand and offer to return Brown George. The claim was rejected and he appealed to the District Court where pleadings were framed by direction of the court and the issues were tried November 15, 1893, before a jury and the claimant had a verdict for \$1,050. On the trial it was shown in evidence that on June 1, 1891, Lynch mortgaged the horse to Ara D. Sprague to secure the payment of his two notes for \$300 and interest each, one due in a year and the other in two years from that date. There was no proof that the mortgage was discharged or that the notes were paid. The executor requested the Judge to charge the jury that if the claimant mortgaged the horse prior to his offer to return him and placed it out of his power to return the horse free from the incumbrance, he could not recover in the action. The judge refused and the executor excepted. A case was made and the executor moved for a new trial but was refused. He appeals.

Wells & Hopp, for appellant.

The complaint contains no averment of warranty but bases the right to recover on a breach of a conditional sale, alleging performance or proffer of performance. No judgment can be based on a cause of action not pleaded. *Kelsey v. Western*, 2 N. Y. 500; *Truesdell v. Sarles*, 104 N. Y. 164; *Hudson v. Swan*, 88 N. Y. 552.

The existence of a chattel mortgage was a bar to a return. The horse was not the property of the claimant, but of Sprague. If the executor had accepted return, Sprague could have retaken the horse under his mortgage. The executor could not accept the horse subject to the incumbrance and deliver to Lynch a horse in return as authorized by the contract. As the evidence stands the fact of giving the mortgage was conclusive on the claimant of acceptance

of the horse under the condition of sale and of his inability to return him. *Ray v. Thompson*, 12 Cush. 281; 2 Benjamin, Sales, 743.

Harries & Duxbury, for respondent.

The contention of the claimant is, that in December, 1888, the testator John Ward sold him the horse for \$1,500 warranting him to be a reasonable foal getter and providing that in case he was not, claimant should have the privilege of returning him and receiving in lieu thereof another of the same breed and of equal value, or a return of his money. The complaint alleges that the horse was purchased on this condition and that he did not prove to be as represented, that the plaintiff relied upon the warranty and sustained damage in the sum of \$1,500. This is all that is necessary for a complaint for breach of warranty. *Bergeler v. Michael*, 84 Wis. 627.

Parole evidence of a verbal warranty on a sale of chattels is admissible. *Conrad v. Marcotte*, 23 Minn. 55; *Kelly v. Clow Reaper Mfg. Co.*, 20 Minn. 88; *Frohreich v. Gammoud*, 28 Minn. 476; *Strohn v. Detroit & M. Ry. Co.*, 21 Wis. 554.

The chattel mortgage was a conditional sale and it did not become necessary for the claimant to remove this lien on his horse when the executor refused to accept the return of the horse and it would be error to charge that the making of the chattel mortgage put it out of the power of the claimant to return the horse for the reason that by the payment of the notes secured by this chattel mortgage the horse would be released, and for aught that appears in this record they were paid. They were both past due.

Where goods sold are warranted by the seller who stipulates that if the buyer does not find the goods to be as warranted, he may rescind the contract of sale and return the goods, the buyer, in case the warranty proves false, is not confined to a remedy by rescission and return, but may have his action for the breach. *Kemp v. Freeman*, 42 Ill. App. 500; *Mandel v. Buttles*, 21 Minn. 391; *Day v. Pool*, 52 N. Y. 416; *Love v. Ross*, 89 Ia. —.

MITCHELL, J. The plaintiff contends that his recovery in the court below can be sustained on the ground that this was an action for damages for breach of warranty. It is undoubtedly true that where there is a warranty a right of action for its breach may exist, al-

though the vendor had expressly agreed to take back the property in case it did not correspond with the warranty, the right of the buyer to return being merely a cumulative remedy. But the trouble with plaintiff's position is that he has not alleged any warranty. The allegations of the complaint are merely that he bought the stallion "upon the express condition that, if said stallion did not prove a reasonable foal getter upon at least two seasons' trial, that he was to have the privilege of returning said stallion, and to receive in lieu thereof another stallion, of equal value, upon the same conditions." The fact that plaintiff subsequently, in his pleading, calls this a "warranty," does not make it so. The complaint then proceeds to allege that the stallion did not, on such trial, prove to be a good foal getter; that plaintiff offered to return it; that defendants refused and still refuse to accept it, although plaintiff is ready and willing to do so. Aside from the statement of certain facts tending to excuse a delay in offering to return, this is all, of substance, that there is in the complaint.

This was a sale on a condition subsequent, to wit, that, if the animal did not prove a good foal getter, plaintiff might, at his election, return it, and receive another stallion in place of it. Being a sale on condition subsequent, the property vested presently in the vendee, defeasible only on the performance of the condition. If the plaintiff in the mean time disabled himself from performing the condition, then the sale became absolute. *Rary v. Thompson*, 12 Cush. 281.

It appears that, a few months before plaintiff tendered a return, he had executed a chattel mortgage on the horse to a third person, to secure a debt of \$600, payable in one and two years. This mortgage, presumably, remains a subsisting and valid lien on the property. This act disabled the plaintiff from performing the condition, for, clearly, the defendants were not required to accept a return of the horse with this incumbrance upon it.

For this reason, if no other, the plaintiff could not recover.
Order reversed.

Buck, J., absent, sick, took no part.

(Opinion published 59 N. W. 311.)

JULIUS REES vs. ADOLF LOWY.

Argued May 10, 1894. Reversed May 25, 1894.

No. 3813.

Evidence did not prove a surrender of a lease.

Held, that there was no evidence tending to prove a surrender of a lease, and a release of the lessee from his covenants, either by the contract of the parties, or by operation of law.

Implied surrender of lease by operation of law.

A surrender of a lease by operation of law cannot be implied from the mere fact that the lessor assented to an assignment of the lease, and subsequently accepted rent from the assignee in possession.

Appeal by plaintiff, Julius Rees, from an order of the Municipal Court of the City of Minneapolis, *C. B. Elliott, J.*, made November 18, 1893, granting the motion of defendant, Adolph Lowy, for a new trial.

On October 1, 1892, the plaintiff, Julius Rees, leased to defendant, Adolph Lowy, the store No. 202 Hennepin Avenue, Minneapolis, with the cellar under it for a saloon for the term of two years from that date, and defendant agreed to pay therefor \$2,000 a year rent, payable monthly in advance, viz. \$166.67 on the first day of each month. On April 7, 1893, the defendant with plaintiff's consent assigned the lease and delivered the possession of the premises to Frank X. Barge. He soon after claimed to be a minor and repudiated the assignment on that account. Plaintiff brought this action to recover of Adolph Lowy the rent for the month of June, 1893. The court made findings of the facts and ordered judgment for the plaintiff for \$166.67 and costs. The defendant moved for a new trial. The court granted the motion. Plaintiff appeals.

S. Meyers, for appellant.

A surrender may take place only in two ways, first, by agreement between the parties; second, by operation of law. There is no evidence of surrender by agreement. There must be a clear intent to make a new contract with the assignee and to discharge the original lessee, otherwise his liability continues. *Grommes v. St.*

Paul Trust Co., 147 Ill. 634; *Stern v. Thayer*, 56 Minn. 93; *Nelson v. Thompson*, 23 Minn. 508.

The mere act of receiving rent from the assignee in possession will not operate as a surrender of the lease as to the lessee. *Levering v. Langley*, 8 Minn. 107; *Harris v. Heackman*, 62 Ia. 411.

A release is not to be implied from the mere fact of written assent to the assignment. The lessee remains liable upon his express covenant to pay rent in an action by the lessor, even if the lessor has accepted the assignee as his tenant and collected rent from him. *Bailey v. Wells*, 8 Wis. 141; *Jones v. Bomes*, 45 Mo. App. 590; *Wilson v. Gerhardt*, 9 Colo. 585; *Walton v. Cronley's Adm'r*, 14 Wend. 63; *Bowen v. Haskell*, 53 Minn. 480; *Shaw v. Partridge*, 17 Vt. 626.

F. J. Geist, for respondent.

There was sufficient evidence for the court to find that it was the intention of plaintiff to release Lowy from the obligations of the lease and that plaintiff acted on that intention. He rented the premises in July without notice to defendant. This was clearly a termination of the lease by operation of law. *Levering v. Langley*, 8 Minn. 107; *Bowen v. Haskell*, 53 Minn. 480; *Wheeler v. Walden*, 17 Neb. 122.

The plaintiff relied undoubtedly at the beginning of the action upon the infancy of Frank X. Barge, but he could not substantiate it at the trial. There was an open and notorious change of possession and ownership of all the personal property and of the premises and plaintiff on several occasions after the transfer collected the rent from Frank X. Barge, rented subsequently to Mrs. Barge and later to one Klotz, without giving defendant notice. *Evans v. McKenna*, 89 Ia. —; *Donahue v. Rich*, 2 Ind. App. 540.

MITCHELL, J. The plaintiff leased to defendant certain premises for a term of two years from October 1, 1892, at a specified yearly rental, payable monthly in advance. The lease provided that the lessor might cancel and annul it at once, if it should be assigned without his written consent; also, that, in case of default on part of the lessee in any of its covenants or conditions, the lessor might,

at his option, re-enter, and take possession of the premises, without such re-entry working a forfeiture of the rents to be paid or covenants to be kept by the lessee for the full term of the lease.

This action is to recover the rent for the month of June, 1893. The defense is that on April 8, 1893, the defendant, with the written consent of the plaintiff, assigned the lease, and surrendered possession, to one Barge, whom plaintiff accepted as his tenant in defendant's place, and released the latter from all liability on the lease.

The court found against defendant on this issue, and ordered judgment for plaintiff, but, on motion of defendant, granted a new trial, from which order plaintiff appeals. No errors of law, prejudicial to defendant, occurred at the trial, and the findings of fact support the conclusions of law. Hence, the only question is whether the case was one where the court was justified in granting a new trial on the ground that the findings of fact were not sustained by the evidence. There is some slight evidence, of a very vague and unsatisfactory character, that at the time plaintiff gave his written consent to the assignment of the lease to Barge, in answer to defendant's inquiry whether "this released him from all obligations," or if "he was released from everything," plaintiff replied in the affirmative. But it is wholly unnecessary to consider this class of evidence, for the reason that a leasehold interest in land for more than one year can no more be surrendered than it can be created by parol. 1878 G. S. ch. 41, § 10.

There is therefore absolutely no evidence of a surrender of the lease by any contract of the parties. There is also an entire absence of any evidence sufficient to establish a surrender by operation of law.

As was said in *Stern v. Thayer*, 56 Minn. 93, (57 N. W. 329,) a surrender by operation of law can only be built up by invoking and relying on the doctrine of estoppel,—upon a condition of facts, voluntarily assumed, incompatible with the existence of the relation of landlord and tenant between parties who have occupied that position.

Nothing is better settled than that a surrender of the lease, or a release of the lessee, is not to be implied from the mere facts that the lessor assented to the assignment of the lease, and accepted rent

from the assignee in possession; and this is the very most which the evidence, admitted or offered, tended to prove that plaintiff had done; at least, until after the June rent was due, and fully earned. What was done after that cannot affect plaintiff's right to recover the rent for that month; but we may add that plaintiff's taking possession in July, and renting, or attempting to rent, the premises to another tenant after default in the covenants of the lease, and after Barge had vacated them, were things which, under the terms of the lease, plaintiff had a right to do, without working a forfeiture of the rents for the full term of the lease.

Counsel for respondent relies on some things said in *Bowen v. Haskell*, 53 Minn. 480, (55 N. W. 629,) which, if wrested from their context, might seem to imply that the mere consent of the lessor to an assignment of the lease releases the lessee, and terminates the relation of landlord and tenant between them. The most cursory examination of that case will show that nothing of the kind was decided, or intended to be decided. In that case there was an express finding, the correctness of which was not questioned, that plaintiffs accepted Chambers (the second assignee of the lease) as their tenant under the lease, in place of Haskell (the first assignee). Moreover, Haskell being himself merely an assignee of the lease, his liability was founded merely on privity of estate, and not, like that of the lessee, on privity of contract also, and hence terminated with his assignment to another.

The evidence was such that it would not have supported any other finding than that which the court made. Consequently, the order cannot be sustained, even under the rule of *Hicks v. Stone*, 13 Minn. 434 (Gil. 398).

The order granting a new trial is reversed, and the cause remanded, with directions to the court below to render judgment in favor of the plaintiff, in accordance with the findings of fact and conclusions of law.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 310.)

STATE OF MINNESOTA vs. M. L. GLADSON.

Argued May 16, 1894. Affirmed June 1, 1894.

No. 8679.

Statute requiring railroad passenger trains to stop at county seats, valid.

Laws 1893, ch. 60, requiring railroad companies to stop all regular passenger trains at county seats, is not unconstitutional or void, either as being an unreasonable regulation or as interfering with interstate commerce.

Same—although carrying United States mail.

Said statute is not void as to a train carrying United States mail, which also carries passengers between points within this state.

Appeal by defendant, M. L. Gladson, from a judgment of the District Court of Pine County, *F. M. Crosby, J.*, entered January 16, 1894.

Defendant was a locomotive engineer engaged with an engine in hauling the afternoon through passenger train between St. Paul and Duluth. On July 22, 1893, he run his train as usual through the village of Pine City, county seat of Pine County, at about four o'clock in the afternoon without stopping. Complaint was made before a Justice of the Peace and he was arrested, tried and convicted. He appealed to the District Court of Pine County where he was again tried, convicted and sentenced to pay a fine of \$25 and the costs \$30.57. He appealed, gave bond and obtained a stay of proceedings.

J. D. Armstrong and Bunn & Hadley, for appellant.

This case should be a landmark of the law indicating a point beyond which the legislative power cannot go in infringement of private rights. It is now settled that the legislature cannot own and operate the railroads. *Rippe v. Becker*, 56 Minn. 100. This involves the conclusion that they cannot operate or run railroads without owning them. The province of the legislature is restricted to regulation, and regulation must be reasonable.

v.57M.—25

The legislature cannot enact unreasonable limitations and restrictions on the speed of trains. To be valid these must fall within the police power, they must be justified by a police necessity. *Evison v. Chicago, St. P., M. & O. Ry. Co.*, 45 Minn. 370.

The legislative power to fix rates is limited by the courts to the fixing of reasonable rates. The legislative imposition of unreasonably low rates is a taking of property contrary to the constitutional limitation. *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418.

This statute is a regulation of interstate commerce not within the power of the state. If passengers or freight are carried on a through contract and rate from one state to another, that business is interstate commerce. Each carrier concerned in the transportation may stop its trains or cars within the state where they started. Such commerce is still interstate, and the vehicles used in the carriage are instruments employed in interstate commerce. The carriage of passengers and express by this train from St. Paul to West Superior was interstate commerce, though there was a transfer at West Duluth to another connecting train running to Superior. *Wabash, St. L. & P. Ry. Co. v. Illinois*, 118 U. S. 557; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114; *The Daniel Ball*, 10 Wall. 557.

We concede the power of the state to pass proper police laws even though they operate incidentally to burden interstate commerce. Such laws do not rest on any power in the state to regulate commerce, but on the power to protect the lives, property, health and morals of the community. On this principle inspection laws, health laws, quarantine laws and similar laws are held valid, though operating on commerce. *Gibbons v. Ogden*, 9 Wheat. 1; *Railroad Co. v. Husen*, 95 U. S. 465; *Patterson v. Kentucky*, 97 U. S. 501; *Willis v. Standard Oil Co.*, 50 Minn. 290; *Morgan v. Louisiana*, 118 U. S. 455; *Smith v. Alabama*, 124 U. S. 465; *Nashville, C. & St. L. Ry. Co. v. Alabama*, 128 U. S. 96.

But except as to necessary and reasonable police regulation resting on the rule in *Gibbons v. Ogden*, the states have no power to burden interstate commerce. Non-action by congress is equivalent to a declaration that commerce between states shall be free. *Walling v. Michigan*, 116 U. S. 446; *Brown v. Houston*, 114 U. S. 622; *Welton v. Missouri*, 91 U. S. 275; *Hall v. De Cuir*, 95 U. S. 485.

This law is not a police regulation valid as such though creating a burden on commerce. The law is a regulation of commerce pure and simple, operating and intended to operate directly on commerce. It is a commercial, not a police regulation. As such it must fall because it throws a burden on and is a regulation of commerce between the states. The police power in its broadest sense is founded on the maxim, "*Sic utere tuo ut alienum non laedas.*" *Thorpe v. Rutland, &c., Ry. Co.*, 27 Vt. 140; *Butler v. Chambers*, 36 Minn. 69; *Beer Co. v. Massachusetts*, 97 U. S. 33; *Slaughter House Cases*, 16 Wall. 36; *Mugler v. Kansas*, 123 U. S. 666.

Illinois Cent. R. Co. v. People, 143 Ill. 434, and *Chicago & A. R. Co. v. People*, 105 Ill. 657, are cases sustaining the law. It is supposed by the Illinois court in those cases that such laws have some reference to the despatch of court business, the indictment and prosecution of criminals, the attendance of witnesses and jurors. But a law that all trains must stop cannot be justified on this ground where it is plain the law could not compel the running of the train at all. The law in short compels all trains to stop, whether there is any public convenience or necessity to be served or not. If the Illinois reasoning is correct, no obstacle exists to compelling railroads to carry people free of fare to or from county seats.

As to carrying of the United States mail, it is in the discretion of the postmaster general to determine at what hours the mail shall arrive at and depart from postoffices. Upon this point his decision is absolute and cannot be controlled by the states. *Neil v. Ohio*, 3 How. 720. The road in question is a post road and the postal service thereon is committed to the United States by the constitution. U. S. Rev. Stat. § 3964. If the legislature can pass this law it can cripple and impede the United States mail service.

S. G. L. Roberts, R. C. Saunders, H. W. Childs and George B. Edgerton, for the state.

The police power of the state extends to what is variously termed the "public welfare," "public prosperity," "common good," and "public well being." *Thorpe v. Rutland, &c., Ry. Co.*, 27 Vt. 140; *State v. New Haven & N. Co.*, 43 Conn. 351; *Munn v. Illinois*, 94 U. S. 113; *Davidson v. State*, 4 Tex. App. 545; *Railroad Co. v. Husen*, 95 U.

S. 465; *Barbier v. Connolly*, 113 U. S. 27; *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307; *Mugler v. Kansas*, 123 U. S. 623; *Powell v. Pennsylvania*, 127 U. S. 678; *Lake View v. Rose Hill Cem. Co.*, 70 Ill. 191; *Butler v. Chambers*, 36 Minn. 69.

This act is one affecting the public welfare. In *Chicago & A. R. Co. v. People*, 105 Ill. 657, the court briefly states the character of the business transacted by the public through the county officials at county seats, and it is unnecessary to repeat it here. Public necessities may require trains to stop at county seats and this question is for the legislature. *Pennsylvania Co. v. Wentz*, 37 Ohio, 333; *Commonwealth v. Eastern R. Co.*, 103 Mass. 254; *State v. New Haven & N. Co.*, 43 Conn. 351.

County seats unquestionably require greater train facilities than other towns of the same size and doing the same amount of business. This feature of the case is illustrated by the fact incidentally disclosed by the evidence, "We have stopped there to let the Judge off."

The state has the power to require railroad companies to fence their roads, to slacken the speed of their trains while running through cities, to post their tariffs and time tables at designated places, and to stop their trains at draw bridges and railroad crossings. And why not at county seats?

All will admit that the law has some relation to the public welfare. If so, the legislature had the power to pass it and to determine the necessity for the law. Its judgment is final. The reasonableness of the law is not for judicial investigation, unless it has no real or substantial relation to the public welfare, or is a palpable invasion of rights secured by the fundamental law. *Powell v. Pennsylvania*, 127 U. S. 678; *Butler v. Chambers*, 36 Minn. 69; *Evison v. Chicago, St. P., M. & O. Ry. Co.*, 45 Minn. 370; *Rippe v. Becker*, 56 Minn. 100; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *Craig v. First Presbyterian Church*, 88 Pa. 42.

It is sometimes difficult to determine when an act tends to regulate interstate commerce in the constitutional sense of the term. The deposit in congress of the power to regulate interstate commerce was not a surrender of the police power of the state. Rail-

road Co. v. Husen, 95 U. S. 465. It is not everything that affects commerce that amounts to a regulation of it within the meaning of the constitution. *Munn v. Illinois*, 94 U. S. 113; *State Tax on Railway Gross Receipts*, 15 Wall. 293; *Illinois Cent. R. Co. v. People*, 143 Ill. 434; *Chicago & A. R. Co. v. People*, 105 Ill. 657; *State v. Baltimore & O. R. Co.*, 24 W. Va. 783.

The statute is not an unlawful burden on the carriage of the United States mail. The cases cited upon this point mainly involve the question of the delay and obstruction of the mail by the arrest of the carrier while engaged in transporting it. That question is not involved in this case. We submit a reference to a few additional authorities. *Ohio & M. R. Co. v. McClelland*, 25 Ill. 140; *Lakeview v. Rose Hill Cem. Co.*, 70 Ill. 191; *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307; *Smith v. Alabama*, 124 U. S. 465.

CANTY, J. Pine City is a village of 800 inhabitants, the county seat of Pine county, and a station on the St. Paul & Duluth Railroad. The defendant was an engineer on a passenger train on said railroad, and was arrested, tried, convicted, and sentenced in Justice Court for failing to stop his train at Pine City. He appealed to the District Court, and was there again convicted and sentenced, and appeals to this court. The statute under which he was convicted is Laws 1893, ch. 60, which reads as follows:

"All regular passenger trains, run by any common carrier operating a railway in this state, or by any receiver, agent, lessee or trustee of said common carrier, shall stop a sufficient length of time at its stations at all county seats within this state to take on and discharge passengers from such trains with safety, and any engineer, conductor or other agent, servant or employé of, or any person acting for such common carrier or for any receiver, agent, lessee, or trustee of such common carrier, who violates any provision of this act is guilty of a misdemeanor and punishable by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail for not less than ten days nor more than three months; provided, however, that this act shall not apply to through railroad trains entering this state from any other state, or to transcontinental trains of any railroad."

This train was a fast express, running from St. Paul and Minneapolis to Duluth, stopping only at railroad crossings and junctions, but not at stations on the way. Besides this train, there were two other passenger trains and one accommodation train run each way every day, which stopped at Pine City.

1. It is contended by appellant that this law is so unreasonable and oppressive as against the railroad company that it is unconstitutional and void. We are not of that opinion. While it seems to us that it is rather drastic legislation to compel this train, which is designed only for through traffic, and stops at no other stations *en route*, to stop at this one station, while there are so many other trains to do the local business, still we cannot substitute our judgment for that of the legislature. There are reasons in support of the law on which the legislature had a right to come to the conclusion at which they arrived. Besides, this law does not apply alone to this train, this county seat, and this railroad, but to all railroads, all county seats, and, with a few exceptions, to all trains; and there are not the same reasons for assailing such a general law merely because it works hardship or inconvenience in exceptional cases as if it worked such hardship or inconvenience in all cases to which it applied. It is a regulation of common carriers which the legislature has the power to impose, and it is certainly not so unjust and unreasonable that the courts should declare it void. See *Chicago & A. R. Co. v. People*, 105 Ill. 657, and *Illinois Cent. R. Co. v. People*, 148 Ill. 434, (33 N. E. 173,) where a similar law is held valid.

2. The evidence showed that, while the train in question ran only to Duluth, one-third of the passengers it carried were carried on through tickets to Superior, Wis., and were transferred at Duluth to another train, which connected with this one, and carried these passengers to Superior. The train being used to some extent in the business of interstate commerce, it is contended for this reason that the legislature had no right to impose this regulation on it. We do not agree with counsel for appellant. While it is not necessary to put it on so narrow a ground, we will say that this is not a regulation of interstate traffic, but most distinctively a regulation of local traffic, for the purposes of which the train was required to be stopped.

3. The evidence showed that the train in question carried the United States mail, and it is contended that for this reason the regulation was void. The point is without merit.

The judgment appealed from should be affirmed. So ordered.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 487.)

YELLOW MEDICINE COUNTY BANK *vs.* O. J. TAGLEY *et al.*

Argued May 17, 1894. Reversed June 1, 1894.

57 391
75 73

No. 8741.

Evidence of good faith and want of notice on the purchase of negotiable notes.

The plaintiff having purchased the negotiable promissory note in suit for a valuable consideration before maturity, *held*, it did not establish its good faith, and want of notice or knowledge of any defenses to the note, so conclusively that the same must be held established as a question of law, but the question of its good faith and want of notice is for the jury.

Material alteration a question for the jury.

Held, on the evidence in this case, it was a question for the jury whether a material alteration was made in the note, without the consent of the makers, after it was made and delivered.

Laws 1883, ch. 114, construed.

Where the maker of a negotiable promissory note was induced to sign the same by fraudulent representations as to the nature and effect of the instrument signed, and under the belief that he was signing some other or different negotiable instrument, *held*, in such a case, Laws 1883, ch. 114, does not apply, so as to avoid the note, for such fraudulent representations, in the hands of an innocent purchaser in good faith, before maturity, for value.

If agent violate instructions, who shall sustain the loss.

Where several makers of a negotiable promissory note left it with the payee under an agreement that it should not take effect until certain others had signed it also, and, in violation of the agreement, the payee indorsed and disposed of it, *held* this is no defense against an innocent holder in good faith, for value, before maturity.

Other rulings.

Other rulings of the court below considered and disposed of.

Appeal by Yellow Medicine County Bank, from an order of the District Court of Polk County, *Frank Ives, J.*, made November 2, 1893, denying its motion for a new trial.

The plaintiff alleged that at Erskine on February 16, 1891, the defendants, O. J. Tagley and thirteen others, farmers in the vicinity, made and delivered to Clancy Bros. their negotiable promissory note for \$800 and interest due April 1, 1892; that Clancy Bros. sold and indorsed the note before maturity to the plaintiff, that plaintiff bought it in good faith in the due course of business, that only \$200 had been paid thereon, and he asked judgment for the amount unpaid. Clancy Bros. did not defend, but the fourteen makers interposed a general denial and further answered that in February, 1891, they each agreed with the agent of Clancy Bros. to subscribe for one share of stock in a corporation, called the Erskine Horse Company, organized to purchase and manage a stallion to be bought of Clancy Bros. That the agent represented that there were to be twenty three shares of the stock of \$100 each, that they were to be paid for in three equal annual payments and that all the shares must be taken before the subscription would be valid. That they were each and all unable to read English and on the day of the date of the note the agent falsely represented to them severally and they each believed, that all the shares had been taken and that they were induced thereby to sign the note in suit and two others. That the agent stated to each signer that the notes were for \$33.33 each and due in one, two and three years, that defendants severally relied on these representations and were not negligent in the premises, that the note in suit was afterwards altered by inserting in it words and figures not in it when it was signed, and they asked judgment that plaintiff take nothing.

The issues were tried March 9, 1893. What occurred at the trial is sufficiently stated in the opinion. Defendants had a verdict. Plaintiff moved for a new trial. Being denied it appeals. The discussion here was upon the evidence.

A. A. Miller, for appellant.

H. Steenerson, for respondents.

CANTY, J. During the first part of February, 1891, the defendants Clancy Bros., through their agents, organized an association among the farmers of Polk county for the purpose of selling to this associa-

tion a stud horse. These agents were Shannon and Soderberg, who went around among the farmers, and procured the other defendants herein, and some others, to sign some agreement, written in a book, to the effect that each signer would take one share in the horse, and that there should be twenty three shares, of \$100 each, which should be the price of the horse, but that the contract should not take effect until the twenty three shares were signed; that afterwards these agents claimed that they had procured signers for all of the twenty three shares, and all of said other defendants, except two, met the agents at Erskine, on February 16th, to make further arrangements.

The note in suit, and two others, amounting in all to \$2,300, were then signed by these defendants, and shortly afterwards by the other two. These notes so made and delivered to Clancy Bros. were on February 28th sold, indorsed, and delivered by them to plaintiff. The note in suit is for \$800, and was due on April 1, 1892. The defendants Clancy Bros., who were sued on their indorsement, failed to answer. The other fourteen defendants sued as makers of the note, answered, and on the trial had a verdict. From an order denying its motion for a new trial, plaintiff appeals.

On the trial these fourteen respondents offered evidence tending to prove that only three of them could read English; that Shannon and Soderberg represented to them that the three notes then presented to them to be signed were to be signed by each of the twenty-three shareholders, except one or two, who were to pay their shares in cash, and that by the terms of each note each signer severally agreed to pay \$33.33, and no more, the three notes constituting an agreement on the part of each to pay \$100 for his share, in equal annual installments of \$33.33 each; that they supposed they were signing such notes, and would not otherwise have signed them. Most all of these respondents testified that the figures "\$33.33" were on the face of the note in suit, and that the figures "\$800.00" were not; that the notes so signed were two or three inches longer, and some wider, than the note in suit. And some of those who could read English also testified that \$800 was not written in the note, in either words or figures. This was not contradicted, except by cross-examination to the effect that the note in suit now showed no sign of

erasures or change, and each of the respondents admitted that his signature is on the note.

The plaintiff offered evidence tending to prove that it purchased the notes in good faith, for a valuable consideration, before maturity.

1. Under all the circumstances of the case, we are of the opinion that the question of plaintiff's good faith and want of notice or knowledge of any defense to the note was a question for the jury, and the court below did not err in so leaving it. We will not attempt to recite these circumstances. Many of them may be slight. But there are, in our opinion, enough of them, to which the jury had a right to give more or less weight, and from them infer want of good faith on the part of plaintiff notwithstanding the evidence on its behalf tending to prove good faith.

2. We are also of the opinion that there was sufficient evidence from which the jury might find that the note was altered after its execution in a material respect, so as to avoid it in the hands of an innocent purchaser.

3. We are also of the opinion that if the note is not a forgery, by reason of any such material alteration, and the plaintiff is an innocent purchaser, in good faith, for value, Laws 1883, ch. 114, does not apply, so as to avoid the note in the hands of such an innocent purchaser before maturity, because of fraudulent representations as to the nature or effect of the contract signed.

This statute applies only when the party believes that he is not signing a negotiable instrument at all, and seems to be an adoption, with some modification, of the doctrine discussed in the cases of *Mackey v. Peterson*, 29 Minn. 298, (13 N. W. 132,) decided shortly prior to the passage of this law, and of which doctrine *Foster v. Mackinnon*, L. R. 4 C. P. 704, is the leading case.

The court below charged the jury that this statute did apply, and that, if the signing of the note was procured by such fraudulent representations as to its nature and effect, it would avoid the note in the hands of such innocent purchaser. This was error, for which the order denying the motion for a new trial will have to be reversed.

4. The court refused plaintiff's ninth request, to charge the jury to the effect that if the respondents intrusted the note to Clancy Bros., or their agent, under an agreement that they should procure other

signers to the note before it should take effect, this is no defense against an innocent holder for value, without notice. This, also, was error. See *Ward v. Johnson*, 51 Minn. 480, (53 N. W. 766.)

5. The court also admitted evidence of the size of the respondents' farms, number of acres in wheat, amount of stock, and that some of them had no horses,—had only a yoke of oxen. This evidence was not competent for any purpose in the case, and may have been prejudicial. Evidence of the want of means or ability to pay large notes might be competent on the question of the plaintiff's good faith in purchasing the notes, but this was not such evidence. It seemed to have been offered on the theory that the jury had a right to infer from it that men with small farms and little stock would not be likely to undertake to pay so much, if they knew they were doing so.

These are all the errors we find in the record.

Order reversed, and a new trial granted.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 486.)

HARRY J. FARRELL vs. H. C. BURBANK et al.

Submitted on briefs May 21, 1894. Reversed June 1, 1894.

No. 8716.

An overpayment on a running account, not a gift.

Where the plaintiff is in the employ of defendants, who are advancing him money from time to time on his wages, held an overpayment by them to him under such circumstances cannot be considered as a voluntary payment in the sense that they cannot require him to account for it.

Allegations in an answer held a counterclaim.

Allegations in an answer manifestly set up as a counterclaim, and praying for affirmative relief, will be treated as a counterclaim, though not designated as such in the answer.

Appeal by defendants, H. C. Burbank, B. F. Bloomingdale and F. H. Campbell, from an order of the Municipal Court of the City of

St. Paul, *H. W. Cory, J.*, made December 16, 1893, denying their motion for a new trial.

Warner, Richardson & Lawrence, for appellants.

Bowe & Woodruff, for respondent.

CANTY, J. Plaintiff was a traveling salesman for defendants during the year 1890, and during the year 1891, up to October 20th of that year. This is an action stating three causes of action,—the first for a balance claimed to be due plaintiff for his services in 1890, the second for a balance claimed to be due him for his services in 1891, and the third for \$15.20, which he claims he paid out for his traveling expenses in 1891, and which defendants have not repaid.

The case was tried by the court below without a jury, and the court found in plaintiff's favor on the first cause of action a balance due him of \$144.13, and in his favor on the third cause of action also for said sum of \$15.20.

As to the second cause of action, stripped of all unnecessary and immaterial facts, the court found that plaintiff was employed by defendants in 1891 under an agreement whereby he was to be paid his traveling expenses and four per cent. of the amount of his sales for his service, and that he was so employed from January 1st to October 20th of that year, and his sales amounted to \$25,824.26. "That defendants voluntarily paid plaintiff during said year on account of said services the sum of \$1,311.62." Four per cent. of the sales would be \$1,032.97, and it appears that plaintiff was overpaid by this voluntary payment the sum of \$278.65. But the court permits plaintiff to retain this sum, and orders judgment against the defendants for the full sum of \$144.13 and \$15.20, found due him on the other two causes of action. This was error. The plaintiff was not entitled to retain the overpayments made to him during the last year of his service, without accounting for them, and also collect \$15.20 as expenses for the same time, and also \$144.13 for his services the year before. The finding that this overpayment was "voluntary" amounts to nothing. This is not the kind of a payment or the kind of a case where the doctrine can be invoked that a voluntary payment cannot be recovered. This is a case of a current running account, where there are advances on the one side and continuous earning of the same on the other, and the law im-

plies an agreement to repay any overpayments. The sum found due plaintiff must be deducted from this overpayment, and defendants are entitled to judgment for the balance.

The point is made by plaintiff that defendants do not plead any counterclaim in their answer. They allege that he agreed to work for the whole of the year 1891, and broke his contract, and that he drew and received \$278.65 more than was due him, and demand judgment against him for that sum. This is sufficient pleading of a counterclaim, though not formerly designated as such. *Griffin v. Jorgenson*, 22 Minn. 92.

Plaintiff is allowed \$144.13, and interest thereon from December 31, 1890, to October 20, 1891,—\$8.12,—and also \$15.20, being in all, \$167.45; and, after deducting this from \$278.65, the defendants are entitled to judgment for the balance, being \$111.20, and interest thereon since October 20, 1891.

The order appealed from is reversed, with directions to enter judgment for defendants accordingly.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 485.)

SAM R. EIDE vs. NEHEMIAH P. CLARKE.

Argued May 23, 1894. Affirmed June 1, 1894.

No. 8752.

Lands are assessed when the assessor makes return to the Auditor.

Where a notice of the time when the right to redeem from a tax sale will expire, under 1878 G. S. ch. 11, § 121, was to the person in whose name the lands were assessed the year before, and such notice was made out after the assessor had returned his assessment book for the present year to the county auditor, as provided in section 41, in which book the lands are assessed to another person, *held*, the notice is not to the person in whose name the lands are assessed, and is void, and does not cut off the time to redeem.

Notice misstating dates of judgment and sale.

Where such a notice recited a tax sale as made on a certain day, on which day in fact no such sale was made, and recited the tax judg-

57 397
465 468

ment on which the sale was made as entered on a later day, on which day in fact no such judgment was entered, the tax sale recited appearing on the face of the notice to be void by reason of the false dates, and there being no sufficient description to identify either the sale or the judgment if the false dates are rejected, *held*, the notice is void.

Appeal by plaintiff, Sam R. Eide, from a judgment of the District Court of Swift County, *Gorham Powers, J.*, entered June 8, 1893.

Plaintiff was in possession of and claimed to own in fee the north half of the southwest quarter and the south half of the northwest quarter of section twenty three (23), T. 121, R. 39, in Swift County and commenced this action October 15, 1891, under 1878 G. S. ch. 75, § 2, to determine the adverse claims of the defendant, Nathaniel P. Clarke. He answered that Martin Merrick mortgaged the land January 20, 1878, with covenants to Catharine Swift for \$672 and interest and that Merrick afterwards acquired the patent title, that she assigned the mortgage to defendant and that he foreclosed it June 20, 1891, under a power therein and became the purchaser at the sale for \$1,350, and at the date of the commencement of this action held the certificate of purchase and claimed it to be a valid and subsisting lien on the land. On the trial plaintiff deraigned title under the proceedings mentioned in the opinion to enforce payment of delinquent taxes. The court made findings and ordered judgment that defendant's certificate of sale on foreclosure was a valid lien on the land for the amount thereof but subject to the prior lien of \$105.43 due upon the certificate of sale under the tax judgments and that defendant had the right to redeem from these tax certificates. Judgment was entered pursuant to the order and plaintiff appeals.

S. H. Hudson, for appellant.

The only question raised by this appeal is, whether the notices issued and served as required by 1878 G. S. ch. 11, § 121, were a sufficient compliance with that statute so as to terminate the right of redemption from the tax sales in question.

The objection to these notices and the one on which the court below based its decision, was that they were not addressed to and served on the proper party; that Martin Merrick, to whom the notices were addressed was not the party in whose name the land was

assessed on July 6, 1886, the date of the notices. The question then is, to whom was this land assessed on that date. The facts affecting this question are presented by stipulation of counsel.

The word "assess" or "assessment" is sometimes used to indicate the process or proceedings by which the value or basis for taxation is determined, but more often to the whole proceeding from the beginning until the amount or proportion of the tax each is to pay is finally fixed and determined. This latter construction was adopted by this court in *Webb v. Bidwell*, 15 Minn. 479; *McCormick v. Fitch*, 14 Minn. 252. See, also, *Prentice v. Ashland Co.*, 56 Wis. 345; *People v. Suffern*, 68 N. Y. 323.

If the notices of July, 1886, be considered insufficient for any reason, the notices issued July 29, 1889, were sufficient. It is conceded that when issuing these notices the auditor used a blank form in which he incorrectly inserted the date of tax judgment in the space intended for the date of sale, and *vice versa*. Notwithstanding this error the notices contain all that the statute requires and this error is immaterial.

The amendment made by Laws 1889, ch. 198, to § 121 does not affect this case, because these tax certificates were issued prior thereto. *Merrill v. Dearing*, 32 Minn. 479; *State ex rel. v. McDonald*, 26 Minn. 145. The requirement that the officer return the notice within twenty days is merely directory. *Kip v. Dawson*, 31 Minn. 373; *Banning v. McManus*, 51 Minn. 289.

G. W. Stewart, for respondent.

The stipulation conclusively establishes that at the time of the issuance of the notices of expiration of redemption, July 6, 1886, the lands in controversy were assessed in the name of S. H. Hudson. 1878 G. S. ch. 11, §§ 6, 28, 29, 33, 41, 44, 46. From these several sections it appears that this assessment is the work of the assessor, that this assessment must be made and complied in the months of May and June. The lands in controversy were not assessed in the name of Martin Merrick to whom the notice of redemption issued, and the notice did not terminate the period of redemption. *Wakefield v. Day*, 41 Minn. 344; *Western Land Ass'n v. McComber*, 41 Minn. 20; *Mitchell v. McFarland*, 47 Minn. 535.

The notices of July 29, 1889, are void upon their face. They do not state the correct date of sale nor the correct amount to be paid upon redemption. The date of sale is stated to have been August 14, 1882, and the date of the tax judgment September 22, 1882, a discrepancy which ought to avoid the notices.

CANTY, J. Plaintiff brought the statutory action to determine adverse claims to the real estate in question. Whether he has title to the land depends on whether or not the tax sales hereinafter specified have ripened into titles. The defendant claims a lien as mortgagee under a mortgage from the holder of the title acquired by the government patent.

On the trial by the court below without a jury the court found that the tax sales were valid, but that no notice of the time when the right to redeem from such tax sales would expire had ever been given, and that, therefore, the time to redeem had not expired, and that defendant had a valid lien by virtue of his said mortgage, but it was subordinate to the lien of plaintiff for the sum due him under said tax sales. From the judgment entered thereon plaintiff appeals.

1. The county auditor made out notices—one for each piece of land—of the time when the right to redeem from the tax sales would expire. The first notices so made out were served by publication. They were addressed to one Merrick, a former owner of the land, in whose name it was assessed for the taxes of 1884 and 1885. These notices were made out and dated July 6, 1886, and it is stipulated by the parties that in the proceedings for the assessment of this land in the year 1886 the real-estate list furnished by the auditor to the assessor under the provisions of 1878 G. S. ch. 11, § 29, states that S. H. Hudson is the owner of the land; that the list was returned by the assessor and filed with the auditor, July 5, 1886,—the day before the date of these notices; that the county board of equalization met, and reviewed the list, as required by law, July 19th, and the state board met, and passed on it, in September, 1886.

Section 121 of said chapter 11 requires such notice to be “to the person in whose name such lands are assessed,” and this court has several times held that this is mandatory, and a failure to address the notice to the person in whose name the lands are assessed is fatal. *Western Land Association v. McComber*, 41 Minn. 20, (42

N. W. 543;) *Wakefield v. Day*, 41 Minn. 344, (43 N. W. 71;) *Mitchell v. McFarland*, 47 Minn. 535, (50 N. W. 610;) *Sperry v. Goodwin*, 44 Minn. 207, (46 N. W. 328.)

The question now before the court is, at what stage of the tax proceedings are the lands assessed, within the meaning of the above provision? The appellant claims that they are not assessed until the different equalization boards have passed on the property lists and values, and the taxes are actually apportioned and levied; and that, as the new tax proceedings had not yet reached that stage, the lands were still assessed in the name of Merrick, and the redemption notices were properly addressed to him. We are not of that opinion. The word "assessed" has several meanings, and there is a difference according to the language of the statute between assessing the lands and assessing the taxes. We are of the opinion that the lands "are assessed," for the purposes of this notice, when the assessor returns the assessment book, properly filled out, to the county auditor, as provided in section 41; and the name of the person then stated in the assessment book as owner of a parcel of land is the person in whose name the land is then assessed. Section 29 provides that the county auditor shall provide the necessary assessment books, and in the real property assessment books make out a complete list of the lands subject to taxation, and the names of the owners if to him known, and deliver them to the assessors on the last Saturday in April. Section 32 provides that the assessor shall assess all real property situated in his town. Section 33 provides that he shall do this in May and June of each year, and shall actually view and determine the true and full value of each tract of land. Section 39 provides that the town board of equalization shall meet on the fourth Monday in June for the purpose of reviewing the assessment of property in such town. Section 41 provides that the assessor shall return the assessment books to the county auditor on or before the first Monday in July, and that they shall be filed and preserved in his office. Section 43 provides that the county auditor shall then examine the books, and, if he discovers that the assessment of any property has been omitted, he shall enter the same upon the list, and forthwith notify the assessor, etc. The lands are assessed as soon as the books are returned by the assessor to the county auditor, though the taxes are not yet assessed. This land being assessed in

v.57M.—26

the name of S. H. Hudson at the time these redemption notices were made out, they are void, and did not cut off the time to redeem.

2. The second set of notices so served were made out for the same lands, and dated July 29, 1889, but recite that the tax sale took place on the 14th day of August, 1883, under a tax judgment entered on the 19th day of September, 1883, while, as a matter of fact, the sale was on the latter date, and the judgment was entered on the former. These notices described a sale as taking place more than a month before the entry of the judgment under which it was made. Such a sale would be void on its face. On the other hand, if we reject both of these false dates, we are of the opinion that there is not left sufficient description to identify either the sale or the judgment, at least with the certainty required in such proceedings to divest the owner of his title. For these reasons we are of the opinion that these notices of the time of expiration are also void.

This disposes of the case, and the judgment appealed from should be affirmed. So ordered.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 484.)

E. C. DAVIS *vs.* CROOKSTON WATERWORKS, POWER & LIGHT CO. (HUGH THOMPSON, Intervener).

Submitted on brief by appellant, argued by respondent May 18, 1894. Reversed in part June 1, 1894.

No. 8759.

Who should make a lien statement after the claim has been assigned.

Where a person performing labor or furnishing material in the erection of a building is entitled to a mechanic's lien to secure the sum due him therefor, but, before filing the lien statement, assigns the sum due him to another as collateral security for the payment of a debt due from him to such other, *held* he is entitled to file such lien statement afterwards within the statutory time, and the same will secure his equitable rights in the claim assigned, and also inure to the benefit of such assignee.

Held, further, when such lien claimant makes an absolute assignment of the sum so due him, and not merely an assignment for the purpose of security, a lien statement afterwards filed by him on his own behalf will not inure to the benefit of his assignee, but is void. *Held*, further, it is competent to show by oral evidence that such a written assignment, absolute on its face, was in fact intended merely as security.

Evidence excusing delay in performing a contract.

Where a contract provided that it should be performed on or before a day named, and provided as stipulated damages the payment of a certain sum per day for each day's delay thereafter, *held* it does not apply where the delay is caused by the failure of the other party to the contract to perform on his part. *Held*, further, that there was evidence sufficient to sustain the finding that such delay in this case was excused by reason of such failure of the other party to perform, and by reason of other excuses provided for in the contract.

Judgment not justified by the facts found.

Findings *held* not to justify a judgment declaring the sum due a lien on the property.

On Application for Reargument.

Pleading.

In an action to foreclose a mechanic's lien under Laws 1889, ch. 200, § 10, the allegations in an answer are deemed controverted without a reply.

Appeal by defendant, the Crookston Water Works Power and Light Company, from an order of the District Court of Polk County, *Frank Ives, J.*, made December 4, 1893, denying its motion for a new trial.

On April 27, 1892, defendant entered into a contract with plaintiff, E. C. Davis, and Henry Nolan, by which they agreed to build a power house for it. On May 9, 1892, Davis and Nolan assigned this contract and all their rights thereunder to the intervenor, Hugh Thompson, he agreeing to assume and pay all claims for labor and material then due. Defendant was notified of such assignment and all payments thereafter made were made to him. Notwithstanding this assignment Davis and Nolan on February 4, 1893, made and filed a statement of lien in their own names and for their own benefit alleging that there was due them from defendant on the contract \$7,052.27. On the same day Nolan assigned to Davis his interest in and to the lien and the claim thereby secured. On February 6,

1893, Davis commenced this action to foreclose this lien and demanded judgment against defendant for \$7,052.27. Hugh Thompson intervened and asserted his rights under the assignment to him. The issues were tried August 7, 1893. Findings were made and judgment ordered for the intervenor.

Findings of facts, Nos. 17 to 21 inclusive and the third subdivision of the conclusions of law mentioned in the opinion, were in substance that Henry Nolan and the plaintiff, E. C. Davis, made and filed a lien statement claiming a lien for \$7,052.27 upon the power house of defendant, that Nolan assigned his interest therein to Davis and Davis assigned the entire demand absolutely to the intervenor, Hugh Thompson. That the claim is a lien upon the power house and that the house and appurtenances should be sold by the sheriff to pay the debt.

R. J. Montague and W. F. McNally, for appellant.

H. Steenerson, for plaintiff Davis.

E. M. Stanton, for intervenor Thompson.

CANTY, J. This is an action commenced by plaintiff to foreclose a mechanic's lien. Plaintiff alleged that he and one Nolan entered into a contract with defendant to erect a power house for it at Crookston, and furnish a part of the material for the same; that they performed the contract, and filed the lien statement within the statutory time; and that afterwards Nolan assigned all his right and interest therein to plaintiff. The defendant answered, and, among other things, alleged that, before the commencement of this action, the plaintiff and Nolan assigned this claim and demand to Thompson, and that plaintiff had no right or interest therein. The answer did not allege that this assignment was made before the lien statement was filed.

Thompson intervened, and alleged an assignment to him by plaintiff and Nolan, before the completion of the work, of all the sums earned and to be earned by them under the contract, and demanded judgment in his favor for the sum claimed to be due. The cause was tried before the court without a jury. The court found for the intervenor, and ordered judgment declaring the sum found due a lien on the premises, and ordered the same to be foreclosed and sold

to pay such sum, and, from an order denying its motion for a new trial, plaintiff appeals.

1. On the trial a written assignment, absolute in form, to Thompson from plaintiff and Nolan, of all their right, title, and interest in the contract for the erection of the power house, was given in evidence. This assignment was made and dated soon after the work commenced, and long before it was finished.

It is contended by appellant that, after plaintiff and Nolan had assigned this contract, they could not make or file a statement of lien, and that they could not enforce any such statement made and filed by them, and that the making and filing of the same by them would not inure to the benefit of the assignee, Thompson; that an inchoate right of lien cannot be assigned, but that, if it can, the lien statement should be made by the assignee, and for his benefit, while this lien statement appears to be wholly for the benefit of the assignors.

It appeared by the evidence that the assignment was merely as collateral security to secure the repayment of money advanced by Thompson to plaintiff to enable him to carry on the work. This left sufficient interest in the plaintiff and Nolan to enable them to file the lien in their own names, and the benefit of it would inure to Thompson. On the same principle, plaintiff had sufficient interest in this controversy to commence this foreclosure suit in his own name. Thompson was a necessary party to it, and plaintiff's failure to make Thompson a party was cured by Thompson's own intervention.

It is also true that Thompson pleads an absolute assignment to himself of all sums earned, and to be earned, under this contract. Under this pleading, he could not, for the purpose of sustaining the lien statement filed by plaintiff and Nolan, prove that this assignment was merely for the purpose of security. But the failure to allege that the assignment was made merely for the purpose of security was cured by the evidence.

On the cross-examination of plaintiff as a witness on behalf of himself, it was brought out by the questions of defendant counsel and the questions of the court, without objection, that this assignment was given merely as security. Thompson also testified to the same effect, and his testimony on this point was objected to

as incompetent, and tending to contradict a written instrument, but not on the ground that it was inadmissible under the pleadings.

2. Neither was it incompetent as contradicting a written instrument. It is well established that an instrument absolute on its face may be shown to be intended merely as security for the payment of a debt.

3. The contract provided that Davis and Nolan should entirely complete the power house by August 1, 1892; that there should be deducted from the contract price \$25 per day for every day thereafter that they were in default in completing the contract; and the contract further provided "that they shall assume all risks from floods or casualties of every description, and shall make no charge for detention from any cause, but that they shall be entitled in case of detention from any such cause to an extension of time for the completion of said work equal to the amount of such damages." In section 34 of the specification it is also provided that in such case the contractor "will be entitled to an extension of time equal to the amount of such detention for the completion of the work."

The work was not substantially completed until December 24, 1892, and appellant claims that it should be allowed the stipulated damages for all of this time. To excuse this delay, the plaintiff and intervener offered evidence to prove, and the court found, that defendant failed to furnish the contractors certain materials, which by the contract it agreed to furnish, at the time they were needed in the prosecution of the work, thereby delaying the completion of the building, and that alterations in the plans and specifications made by defendant, and other extra work ordered by defendant, further delayed the work, and that highwater, floods and other casualties further delayed the completion, and that, by reason of all of these causes, the completion was so delayed until December 24th as aforesaid.

We are of the opinion that there is sufficient evidence to sustain these findings, and that they are a sufficient defense to the claim for damages for the delay. Neither is it necessary to consider whether the evidence showing excuses for these delays was admissible under the pleadings. No such objection was made on the trial.

4. Neither was it error, as contended by appellant, for the court to refuse to permit it to prove its actual damages caused by this de-

lay. If it was entitled to offset any damages, they were the stipulated damages of \$25 per day, and not the actual damages.

5. There was also sufficient evidence to show that the contract was substantially performed, and that defendant waived a more complete performance. But we are of the opinion that the findings of fact will not sustain a judgment declaring the sum found due to be a lien on the premises.

6. The court finds the assignment of the intervener, Thompson, to be an absolute assignment of all the money earned or to be earned under the contract, and not an assignment merely for the purpose of security, though the uncontradicted evidence showed it was for the purpose of security. Whether such an inchoate right of lien is assignable it is not necessary to decide. Neither is it necessary to decide whether such an assignee could file a lien statement in his own behalf. In this case he has not done so. The assignors, making such an absolute assignment of the money earned on the contract, would have no further interest whatever in the contract after they had performed it on their part, but would then be strangers to the claim, and could not invoke the statutory remedy to secure it any more than they could maintain an action to recover it, and could not on their own behalf file a statement of lien. Whether they could file one on behalf of the assignee it is not necessary to decide. In such a case it would at least have to appear somewhere on the statement that it was so made on behalf of the assignee. *Griffin v. Chadbourne*, 32 Minn. 126, (19 N. W. 647.) It does not so appear in this case. The court having found that the assignment of the claim was an absolute one, this necessarily renders void the lien statement found to have been made and filed by Davis and Nolan, and for this reason the order appealed from must be reversed in part.

The subdivisions of the findings of fact from Nos. 17 to 21, inclusive, are vacated, and so is the third subdivision of the conclusions of law, and a new trial is granted as to all the issues now in the case, or that may be made, except those covered by the other findings of fact.

So ordered.

Buck, J., absent, sick, took no part.

On Application for Reargument.

(June 28, 1894.)

CANTY, J. At the commencement of the trial of this action, plaintiff was sworn in his own behalf; and after he had testified at considerable length as to the failure of the defendant to furnish the material to be by it furnished under the contract, and the length of time he was delayed thereby in completing his contract, defendant's counsel objected to any testimony showing delay caused by the defendant, for the reason that the same is not pleaded. The objection was overruled. This was overlooked in writing the opinion, as it comes after so much of the evidence of that character had been received.

Laws 1889, ch. 200, § 10, provides that "all the allegations of each answer in such action shall be deemed to be controverted, as upon a direct denial or avoidance, as the case may require, without further pleading."

This clearly applies both to the answer of the defendant to the plaintiff's complaint, and also to the answer to the intervenor's complaint. The defendant set up new matter in these answers, to which the two other parties failed to reply; but under this statute they had a right to avoid this new matter by their evidence, so the objection was not well taken.

The motion for a reargument is denied.

(Opinion published 59 N. W. 482.)

ALEXANDER MCKILLOP *vs.* DULUTH STREET RAILWAY CO.

Argued May 14, 1894. Affirmed June 1, 1894.

No. 8831.

Verdict sustained by the evidence.

Held the verdict is sustained by the evidence.

Appeal by defendant, the Duluth Street Railway Company, from an order of the District Court of St. Louis County, *C. L. Brown, J.*, made February 17, 1894, denying its motion for a new trial.

The facts in this case are fully stated in the report of a former appeal, 53 Minn. 532. The second trial occurred September 9, 1893. The jury returned a verdict for plaintiff and assessed his damages at \$7,500.

Billson, Congdon & Dickinson, for appellant.

Our first proposition is, that the plaintiff's claim which at the crucial point rests upon his own uncorroborated statement is utterly discredited by his reckless resort to falsehood in its support. His evidence upon nearly every vital point which it touches is confused, self-contradictory, mercurial in its susceptibility to the leadings and suggestions of his counsel and in fact infested with every known vice. The facts are putty in his hands which he shapes and entirely reshapes in the presence of the jury, with exclusive reference to what at the moment he supposes to be the most available form. His narrative makes a repulsive study of unskillful methods in the fabrication of testimony. These are strong expressions but they are used advisedly, and are susceptible of irrefragable demonstration from the record. He was, in order to recover a large sum of money from the defendant, testifying to a transaction which he claimed had occurred at an isolated spot in the darkness of night when there was no other eye to see or ear to hear, and concerning which therefore his testimony in order to command credit should bear the marks of candor and a regard for truth. Instead of this, it unmistakably discloses that his only aim was to give of the alleged occurrence the version which seemed to him at the moment to be most available. We submit in all candor and seriousness that judicial methods and machinery which should despoil one person for the benefit of another upon the strength of such testimony as this, instead of being a conservator of society would be a crime against it.

Edson, Edson & Campbell, for respondent.

There is no extraordinary or unusual condition shown by the record to justify the interference of this court with the verdict of the jury. The case has been tried twice and a verdict for the plaintiff rendered each time, the evidence in each case being substantially the same. *Bishop v. Corbitt*, 40 Minn. 200; *Egan v. Faendel*, 19 Minn. 231; *Ohlson v. Manderfeld*, 28 Minn. 390; *Martin v Brown*, 4 Minn. 282.

Nor will this court reverse where there is evidence reasonably tending to support the verdict. *Fogerty v. Minneapolis & St. L. Ry. Co.*, 30 Minn. 185; *Jones v. Town*, 26 Minn. 172; *Witherell v. Milwaukee & St. P. Ry. Co.*, 24 Minn. 410; *Benz v. Geissell*, 24 Minn. 169; *Merriam v. Pine City Lumber Co.*, 23 Minn. 314; *Morris v. St. Paul & C. Ry. Co.*, 21 Minn. 91.

There has been no miscarriage of justice. For the purpose of throwing discredit upon plaintiff, appellant seeks by taking segregated portions of plaintiff's testimony, elicited upon this and the former trial and bringing them together to produce the impression that plaintiff has falsified. A careful reading of the parts will not bear appellant out in his position nor in his excessive denunciation of the plaintiff. Appellant forgets that this testimony was carefully collated and examined by both the jury upon the trial and by the trial judge upon the motion for a new trial, and that neither found the glaring inconsistencies which defendant claims to have discovered.

CANTY, J. Plaintiff was a teamster, and, at the time of the injury, was driving his team from West Duluth back to Duluth. He claims that his team took fright, threw him out of his sled, and, in falling, he struck on his head, and was injured so that he became dizzy and dazed, and, after wandering along in this condition, fell down on the street-car track of defendant, and its car ran over him, and cut off his leg. This occurred after dark in the evening. He claims that defendant was negligent—

First, in constructing and maintaining its tracks several inches above the surface of the street, thereby causing an obstruction which threw him out of his sled when the horses ran away;

Second, in failing to keep, at the front of its car, a light of sufficient power to enable the motorman to see an object far enough ahead of the car to enable him to stop the car before the object was reached;

Third, that the motorman was negligent in failing to discover him upon the track in time to prevent the injury by stopping the car.

The defendant claims that the injury was caused by plaintiff's own negligence; that plaintiff was intoxicated to such a degree that he was not able to drive his team, but fell out of the sled, and per-

mitted the team to go off; and that, after staggering along the track, and falling and lying down several times, finally lay down in a state of helpless intoxication, where he was found at the time he was run over by the car.

On the trial the jury returned a verdict for plaintiff, and, from an order denying a motion for a new trial, defendant appeals.

The only ground of error urged is that the verdict is not justified by the evidence; not that there is not sufficient evidence to sustain the verdict, if it was credible, but that the evidence to support the verdict is so contradictory and improbable as to be unworthy of belief.

We are of the opinion that there is sufficient evidence to sustain the verdict, and that the contradictions in the evidence and the credibility of the witnesses are questions for the jury. This being the only question raised by appellant, the order appealed from should be affirmed. So ordered.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 481.)

STATE *ex rel.* GEORGE R. WHITCOMB *et al.* vs. W. E. LOCKERBY *et al.*

57 411
58 277

Argued June 8, 1894. Application refused June 11, 1894.

No. 8954.

Quo warranto, when refused in this court.

The granting of leave to a private person to file an information, in the nature of *quo warranto*, to try the right of persons to hold offices in a private corporation, being discretionary, such leave will be denied, where there are no exceptional circumstances which render inapplicable the remedy provided by 1878 G. S. ch. 79.

Application to this court June 4, 1894, by George R. Whitcomb, Carman N. Smith and eight others, relators, for leave to file an information in the nature of *quo warranto* against W. E. Lockerby and

S. A. Locke for intruding into and usurping the offices of directors, president and vice-president of the Northern Shadecloth Co., a corporation created under 1878 G. S. ch. 34, Title 2. Their verified petition stated that two of the seven directors of the corporation having sold their stock resigned as such officers and at a subsequent special meeting of the stockholders one faction voted for the election of Lockerby and Locke to the vacancies and the other faction voted for two other persons, that at the election disputes arose over the validity, title and control of certain shares of the stock and that on the decision of these disputes depended the result and the future control of the corporate affairs, that Lockerby and Locke claimed to have been elected directors and that two of the old directors united with them and elected Lockerby president and Locke vice-president of the board. An order was granted requiring Lockerby and Locke to show cause before this court on June 8, 1894, why Whitcomb and his party should not have leave to file their relation and obtain a writ of *quo warranto* directed to them for intruding into and usurping the offices of directors, president and vice-president of the corporation. Lockerby and Locke appeared and opposed the application for leave to file the information and moved the court to discharge the order to show cause.

Carman N. Smith, for Whitcomb, et al.

The motion is properly made without the intervention of the Attorney General. The proceeding is taken under the provisions of 1878, G. S. ch. 63, § 1, and not under the provisions of ch. 79. The proceeding is to be governed by the rules of the common law. *State ex rel. v. Sharp*, 27 Minn. 38. Where the proceeding is one to forfeit and take away the franchise of a corporation or to prevent certain persons from acting as a corporation the Attorney General only can proceed. *State v. Sibley*, 25 Minn. 387. He may proceed in all other cases as in proceedings to oust one from the office of county treasurer. *State ex rel. v. Sanderson*, 26 Minn. 333. Or from the office of supervisor of a town. *State ex rel. v. Guiney*, 26 Minn. 313. Or from the office of director of an independent school district. *State ex rel. v. Sharp*, 27 Minn. 38. But where the proceeding is one to try the title to an office in a private corporation, the result thereof

affecting only the stockholders of the corporation, though the Attorney General may institute such a proceeding if he chooses, yet any parties showing an interest in the matter may apply to the court without his intervention. *State ex rel. v. Hammer*, 42 N. J. Law, 435; *Gunton v. Ingle*, 4 Cranch C. C. 438; *State v. Brown*, 5 R. I. 1; *Barnum v. Gilman*, 27 Minn. 466; *Murphy v. Farmers' Bank*, 20 Pa. St. 415; *Commonwealth ex rel. v. Swank*, 79 Pa. St. 154; *State ex rel. v. St. Paul & S. C. R. Co.*, 35 Minn. 222.

Upon this order to show cause the court will consider whether the applicants have made out a *prima facie* case, and are so interested pecuniarily in the matters involved as to entitle them to become relators. The cause will not at this stage be tried upon its merits. The rights of the parties will not be determined upon *ex parte* affidavits. The court will look into the case only so far as to see that the applicants have rights and interests in the matters here in controversy, which should be submitted to the court for adjudication upon testimony taken upon notice.

Francis G. Burke, for Lockerby, *et al.*

This court should not exercise jurisdiction, because it appears that the relators have another remedy, which is prescribed by 1878 G. S. ch. 79, and which is adequate for the relief asked. The granting of leave to file an information in this court is not a matter of strict legal right, but is within the discretion of the court. Leave ought not to be granted where the law furnishes another remedy (especially upon the application of a private person), unless under special and exceptional circumstances. None such exist in this case, and the statutory remedy ought to be pursued in the District Court. *Simpson v. Dowlan*, 33 Minn. 536; *State ex rel. v. Gates*, 35 Minn. 385; *State ex rel. v. Harrison*, 34 Minn. 527; *State ex rel. v. Minnesota Thresher Mfg. Co.*, 40 Minn. 218.

Most of the cases brought in the Supreme Court have been cases for forfeiture of franchises, where the public had large interests at stake, and where the Attorney General's duty was to select his forum, and where the court decided that he had a right to determine in which court he would proceed in such public matters. *State ex rel. v. St. Paul & S. C. R. Co.*, 35 Minn. 222; *State ex rel. v. Min-*

nesota Thresher Mfg. Co., 40 Minn. 213; *State ex rel. v. Sharp*, 27 Minn. 38; *State ex rel. v. Tracy*, 48 Minn. 497; *State ex rel. v. Berry*, 3 Minn. (Gil.) 190.

I am aware that there is one case in which this court took jurisdiction, viz., *State v. Chute*, 34 Minn. 135. But no objection was there taken, such as has been taken here, and for that reason the court did not of its own motion raise the question but the respondents are entitled to raise it. *State ex rel. v. Tracy*, 48 Minn. 497.

CANTY, J. This is an application for leave to file an information in the nature of *quo warranto*, by some of the alleged stockholders and officers of a private corporation, to try the right of some others to hold certain offices in the corporation. In the case of *State v. Dowlan*, 33 Minn. 538, (24 N.W. 188,) it was held by this court: "We are agreed that the granting of leave to file an information, especially upon the application of a private person, is within the discretion of the court, and that leave ought not to be granted where the law furnishes another remedy, unless under special and exceptional circumstances." 1878 G. S. ch. 79, furnishes another remedy, and there are no such special or exceptional circumstances in this case as would take it out of the rule.

Neither do we wish to be understood as holding that there is no other such remedy, except that provided by chapter 79, which must be brought by the attorney general. 1851 R. S. ch. 80, § 1 abolished the writ of *quo warranto*, and provided the remedy now found in said chapter 79. 1866 G. S. ch. 122 repealed the Revision of 1851, but re-enacted all of said chapter 80 thereof, except the first section, which abolished *quo warranto*. Whether this did not revive the common-law writ of *quo warranto*, as a writ to be issued by the District Court, it is not necessary here to decide.

Application denied.

COLLINS, J., absent, took no part.

(Opinion published 50 N. W. 495.)

In re JAMES SHEA, Insolvent.

Argued May 28, 1894. Affirmed June 11, 1894.

No. 8327.

57	415
79	488

A receiver of an insolvent debtor's property is chargeable with its value if he sell it fraudulently.

Where an insolvent and the receiver of his property under the insolvency law enter into a conspiracy by which the receiver agrees to sell the property to a third party, and have the third party transfer it to the wife of the insolvent for his benefit, *held* such sale by the receiver is fraudulent and void as to creditors, and the receiver is chargeable with the full value of the property so sold when that is more than the price received for the property.

Order confirming a sale is not conclusive.

Held, further, that an *ex parte* order confirming such sale is not conclusive as against the creditors, but may be set aside by direct proceedings for that purpose.

Findings sustained by evidence.

Held the evidence in this case is sufficient to sustain the order declaring fraudulent, and setting aside, such a sale.

Receiver's final account, all the creditors to share in increase of net balance.

Where, on an application of the receiver in such a case to settle his final account, a part only of the creditors object, and demand that the receiver account for the full value of the property so fraudulently sold, and the court so orders, *held*, such order inures to the benefit of all the creditors who have not waived their right to attack such sale by taking some position inconsistent with that right.

Other assignments of error disposed of.

Appeal by Daniel H. Moon, receiver, from an order of the District Court of Clay County, *D. B. Searle, J.*, made October 26, 1893, denying his motion to vacate its order and decision regarding his final account.

James Shea of Glyndon in the winter of 1890-1 went to Massachusetts on a visit leaving his agent Sharpstein in charge of his business. Shea was taken sick and did not return as expected. His creditors became impatient and on March 2, 1891, Daniel H. Moon

was on the petition of some of them, appointed receiver of all his non exempt property under Laws 1881, ch. 148, § 2, as amended by Laws 1889, ch. 30, § 2. Moon accepted the trust and made and filed a verified inventory of the property in which its value was estimated at \$13,209.97. It comprised a store building, fixtures and stock of merchandize; a saloon building, fixtures, and stock of supplies therefor; a hotel and the furniture and equipment thereof. Also 1120 acres of farming land partly improved but subject to incumbrances; seventeen horses and mules and other stock; farm implements, machinery, hay, grain and farming supplies, also notes and accounts. Shea's debts as shown by the schedule amounted to \$6,749.33, but the proofs afterwards filed showed them to be \$8,538.43. Shea soon after returned and on April 21, 1891, Moon on affidavit obtained an order allowing him to continue Shea's business, sell goods at retail, carry on the hotel and put in the crops. He put Shea in charge and gave him possession of the property. On May 23, 1891, Moon presented to the court affidavits and obtained an order that he sell all the property in gross at public or private sale and in the manner he might deem for the best interest of the creditors, but subject to the confirmation of the court, that the sale be made on June 13, 1891, at 9 A. M. at the front door of Shea's store in Glyndon, that notice be given by mailing to each of the creditors a copy of the order and publishing it two weeks in the Red River Valley News, a newspaper published at Glyndon. On the day appointed Moon sold all the property to Marcus Johnson for \$2,350 and made report of the sale and advised that the sale be confirmed. This report was presented on June 15, 1891, to the court at Crookston in Polk county and an *ex parte* order obtained confirming the sale.

On October 23, 1891, Moon presented his account and obtained an order that the creditors of the insolvent show cause if any they have at Moorhead November 13, 1891, why this account should not be allowed, a dividend made and he discharged on payment thereof. On the day appointed a number of Shea's creditors appeared and filed objections. They alleged that Moon is a member of the firm of Allen Moon and Co., that Shea owes that firm \$697.49, that Moon soon after his appointment entered into a secret contract with Shea to so conduct the business as to restore the property to him or to his wife for his benefit, for but a small part of its value; and that in

consideration thereof Shea should pay his debt to Allen Moon & Co. in full; that Marcus Johnson bid in the property at Moon's request and in aid of this agreement and that Shea furnished the \$2,350 paid and that Johnson afterwards transferred and conveyed all the property to Shea's wife. The creditors asked permission to prove these facts and others before the court by witnesses subject to cross-examination. The court ordered such hearing and directed the parties to produce their witnesses for examination. The hearing was postponed and was finally had at Moorhead June 21, 1893. After hearing the evidence the Judge found that Moon as receiver agreed with Shea in April, 1891, to sell the property in gross for some trifling amount to some third party who should shortly thereafter transfer and convey the same at substantially the same price to Shea's wife or such other person as Shea should select, and that Shea should thereupon pay the claim of Allen Moon & Co. in full; that Moon procured Marcus Johnson to act as such third party; that he purchased the property in pursuance of this scheme; that the value of the property then exceeded \$5,750 and that Moon knew this and did not act in good faith in the matter, that the sale to Marcus Johnson was fraudulent, that on October 16, 1891, Johnson conveyed and transferred all the property to Shea's wife and exacted from Shea and received therefor \$5,750. The court directed that Moon be charged in his account with this sum for the property with interest thereon from June 15, 1891, in place of the \$2,350 paid at the sale. A case was made, settled, signed and filed containing all the evidence given on this hearing and the rulings and exceptions taken.

On that hearing counsel for the creditors were permitted to give evidence of the market value of the property which the receiver sold to Marcus Johnson. This was appellant's ninth assignment of error.

On the hearing the counsel for creditors asked the witness, G. T. Schurmeier to state whether or not he learned from Shea before the objections were filed his version of the sale as given by him in court. To this the receiver objected as incompetent, irrelevant and immaterial. The objection was overruled and the receiver excepted to the ruling. The witness answered that he did. This was appellant's tenth assignment of error.

On the settled case and on the records and files in the matter the

receiver moved the court to vacate this decision and retry the question. This motion, opposed by the creditors, was denied by the court. From the order this appeal is taken.

John B., and E. P. Sanborn, for appellant.

Mere inadequacy of price or the fact that a higher price might be obtained, is not sufficient ground to set aside a sale. *West v. Davis*, 4 McLean 241; *Whitbeck v. Rowe*, 25 How. Pr. 403; *Stiver's Appeal*, 56 Pa. St. 9.

The order of the court under which this sale was made and the order confirming the sale ought to protect the receiver. The findings and conclusions of the court below that this sale to Johnson was fraudulent and void as between the receiver and the creditors, are not justified by the evidence.

The objections of the receiver to the admission of the testimony of Schurmeier as to what Shea said to him when the receiver was not present, ought to have been sustained.

The only objection to the account is to the item of \$2,350 realized from the sale to Johnson. The only parties who object to this item have claims against the insolvent amounting in the aggregate to about \$2,300. The total amount of the liabilities of the insolvent proved up and allowed in this proceeding is \$8,538.43. None of the other creditors made any objection. So that even if the findings of fact were sustained by the evidence, the order of the court at most should have been that the receiver pay to these objecting creditors their ratable proportion of \$3,400. *In re Shotwell*, 49 Minn. 170.

W. B. Douglass; and Warner, Richardson & Lawrence, for respondents.

The order of confirmation of the receiver's sale did not preclude creditors from questioning the sale on the ground that it was sham or fraudulent. The order of confirmation did not operate as an adjudication, binding on all concerned, that the sale was free from fraud and valid. No notice was given creditors and the order was obtained *ex parte*. *Hackley v. Draper*, 60 N. Y. 88; *Williamson v. Berry*, 8 How. 495; *Woehler v. Endter*, 46 Wis. 301.

The question to Schurmeier and the answer made, show the only

object was to identify the conversation already testified to by Shea without objection and to fix the date of it as being before the hearing of November 13, 1891. Schurmeier was not asked to repeat what was said, but only to state whether the conversation referred to by Shea occurred before these objections were filed.

Perhaps creditors who did not formally intervene could not complain if the court ignored their rights to the full value of the property sold Johnson, but the opposite party cannot complain of the court, if it respects them. Every equity bill filed on behalf of all parties similarly circumstanced would present the same question. All are to share in the fund thus preserved for their benefit. Any other practice would tend to unnecessary labor and expense. If it had appeared in this case as in the *Shotwell Case* that all the rest had actually waived or confirmed the misdoing complained of, then a different question would be presented. Shea's property remains subject to his debts and justice is practically accomplished by compelling Moon to account for what has been realized by him and Johnson from Shea. Johnson was a mere figurehead representing Moon. The trust has been abused by Moon with Johnson's assistance. After they had involved Shea and had got \$5,750 of his property into their own hands, they failed to keep faith with their partner, with the result usual in such cases. He disclosed the fraud to his creditors.

CANTY, J. Said insolvent, James Shea, resides at Glyndon, Minn. On March 2, 1891, a receiver was appointed by the District Court of Clay county of all his unexempt property for the benefit of his creditors under the insolvency law of 1881. The receiver, D. H. Moon, qualified, and proceeded to administer his trust.

On November 13, 1891, the matter came on for hearing on the final account of the receiver. Several of the creditors appeared, and objected to the item of \$2,350 in his final account, being the proceeds of the sale made by the receiver on the 13th of June, 1891, of all the remaining property of the insolvent estate. This objection was made on the ground that this sale was fraudulent and collusive, and that the receiver, insolvent, and purchaser entered into a conspiracy before the sale to procure the transfer of the property to the wife of the insolvent for his use and benefit, and that the sale was made

pursuant to this agreement. It was then ordered that this question be heard and tried on evidence taken in open court, which was done, and the court filed its findings of fact, in which it is found:

That the property which came into the receiver's hands was of the value of \$13,209, and, after disposing of a part of it under the direction of the court, the balance of said property in his hands at the time of said sale was of the value of \$5,750; that prior to said sale the receiver procured the insolvent to claim out of said property his exemptions for the purpose of misleading and deceiving the creditors as to the amount and value of the property available for the payment of debts; that the insolvent was then in possession of all of the property as the agent of the receiver, but the exempt property was never segregated, and the unexempt property was so sold without setting apart or determining what was exempt.

That prior to the sale it was agreed between the receiver and the insolvent that the receiver would obtain leave to and would make said sale, and sell all of said balance of the property so undisposed of for some small amount, less than its value, to some third person, who should shortly thereafter transfer all of the same to the wife of the insolvent on repayment of the sum paid for it, and payment of the sum of \$919 due a firm of which the receiver was a member.

That, pursuant to this agreement, the receiver did, on May 23, 1891, obtain an order of the court ordering him to sell the property June 13th, "subject to the approval of this court," and to publish said order for two weeks prior to the sale in a local newspaper, and serve it by mailing a copy of it to each of the creditors, on or before May 27th; that the order was so served, the sale made, and confirmed by an *ex parte* order procured by the receiver from the judge of the District Court at Crookston, in the adjoining county and judicial district; that the property was afterwards, on October 16, 1891, pursuant to said agreement, transferred by the purchaser, Marcus Johnson, to said wife of the insolvent; that during all of this time the insolvent continued to be in the possession of the property,—before the sale as the agent of the receiver, and afterwards as the agent of the purchaser, Johnson.

As conclusions of law the court found that the receiver should not be charged with \$2,350 as the proceeds of that sale, but with the sum of \$5,750, the value of the property so sold, and the receiver was

ordered to pay that sum, with interest from June 15, 1891, into court. From an order denying a motion for a new trial of the issues so tried the receiver appeals.

The most of the assignments of error are to the effect that the findings of the court are not sustained by the evidence. We are of the opinion that there is sufficient evidence to sustain these findings. There is the positive testimony of the insolvent Shea, with much circumstantial evidence to corroborate it.

The *ex parte* order confirming this sale was not conclusive. This proceeding is not a collateral attack on that order, but a direct attack in the same proceeding, and, while the court should have formally ordered the order of confirmation set aside for fraud, still his "conclusions of law" in effect do so, and mean the same thing.

The aggregate claims of the objecting creditors amount to about \$2,300, while the total liabilities of the insolvent amount to \$8,538; and it is contended by appellant that the most the court should have done was to order the receiver to pay these objecting creditors their ratable proportion of the \$3,400 which the court added to said item of \$2,350, the price for which the property was fraudulently sold. In support of this position the case of *In re Shotwell*, 49 Minn. 187, (51 N. W. 909, and 52 N. W. 1078,) is cited. As far as that case applies that rule as against the creditors who expressly authorized the unwarranted acts of the assignee, and thereby estopped themselves from objecting to those acts, we are willing to follow that case, but no further. But while that case seems to hold that the benefit of the objection does not inure to the creditors not objecting, my associates who were then on the bench state that counsel for the appealing creditors not objecting stated in open court that they did not object to the unwarranted act there in question. We are of the opinion that the order of the court declaring the sale fraudulent, and charging the assignee with the value of the property, injured to the benefit of all the creditors who had not waived their right to attack that sale by taking some position inconsistent with that right.

The ninth assignment of error—the objection to the evidence as to the value of the property so fraudulently sold by the receiver—is not well taken; the evidence was competent.

The tenth assignment of error—the objection to the evidence of Schurmeier—is not well taken. Schurmeier testified that before his firm of creditors filed their objections he learned from Shea, the insolvent, his version of the affair “as given by him here in court to-day about this sale.” This seems to be an effort to identify the time of other conversations as to which testimony had already been given. It was a matter of little importance, and to determine whether or not it was material would require much discussion, and the consideration of many details. If not material, it was not prejudicial. This disposes of all the questions raised, and the order appealed from should be affirmed. So ordered.

(Opinion published 59 N. W. 494.)

ALBERT KAJE *vs.* CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY. CO.

Argued May 31, 1894. Affirmed June 11, 1894.

No. 8650.

Special damages not common to the general public.

The plaintiff's lot abutted on a public alley, which ran through the block from street to street, and the defendant wrongfully obstructed the alley at a different point in the same block so as to close up one end of the alley, which was too narrow to permit teams drawing vehicles to enter and turn around in it, and for that reason access was largely cut off from the rear of plaintiff's lot, on which he resided, causing him damage. *Held* it sufficiently appears thereby that plaintiff sustained special damage not common to the general public.

Smoke, dirt, and soot from a lawful business.

Where such obstruction consisted of a roundhouse and machine shop, which emitted forth smoke, dirt, and soot, *held*, the business itself being lawful, the fact it was carried on partly on this alley did not make it unlawful.

Appeal by defendant, Chicago, St. Paul, Minneapolis and Omaha Railway Company, from an order of the District Court of Ramsey County, *Hascal R. Brill, J.*, made November 13, 1893, overruling its demurrer to the complaint.

S. L. Perrin, for appellant.

The complaint does not contain sufficient allegations of special damage to the plaintiff to enable him to recover. *Shaubut v. St. Paul & S. C. R. Co.*, 21 Minn. 502; *Simmer v. St. Paul*, 23 Minn. 408; *Rochette v. Chicago, M. & St. P. Ry. Co.*, 32 Minn. 201; *Barnum v. Minnesota T. Ry. Co.*, 33 Minn. 365; *Shero v. Carey*, 35 Minn. 423; *Thelan v. Farmer*, 36 Minn. 225; *Swanson v. Mississippi & R. R. B. Co.*, 42 Minn. 532; *Carroll v. Wisconsin C. Co.*, 40 Minn. 168.

John W. Lane and *Ambrose Tighe*, for respondent.

The facts set forth in the complaint show a wrong done and imply the existence of a legal remedy. The alley is so narrow that wagons cannot be turned in it, but as long as it is open through the full extent of the block, it affords a means of access to the rear. It is the only means of access to the rear of plaintiff's premises. His lot is but twenty-five feet in width, and it is not possible for him to build a roadway across it from the street back. The defendant without permission has taken exclusive possession of the west one hundred feet of this alley and permanently occupies it, not with railroad tracks which may be crossed but with a substantial structure of brick and stone completely blocking the way. *Aldrich v. Wetwore*, 52 Minn. 164; 16 Am. & Eng. Encyclopædia of Law, 971.

CANTY, J. This is an appeal from an order overruling a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action.

The complaint alleges that the plaintiff is the owner of a city lot, 25 feet wide, the rear end of which abuts on a public alley, 20 feet wide, running through the block from street to street, and that prior to June 1, 1891, said alley was open for public use throughout its full extent, and was a means of access to plaintiff's lot; that, at said time, defendant erected across the end of said alley a building used as a roundhouse, and machine and repair shops, and has ever since maintained the same, and kept said alley closed; that, for the last three years, plaintiff has occupied his said lot, and resided in his dwelling house thereon, and said acts of defendant have cut off his access to the rear of said lot; that said obstructions completely

cut off access to said alley from one of said streets, and that the alley is so narrow that it does not permit of the turning in it of a vehicle drawn by beasts of burden; that plaintiff was damaged by reason of said acts in a sum named, and demanded judgment.

It appeared by the complaint that the plaintiff's lot fronted on a street, and also that one end of the alley was open, and for this reason it is contended by appellant that it does not appear that plaintiff has sustained any special or peculiar damage not common to the general public.

We are not of that opinion. What constitutes special or peculiar damage, for which the private owner may maintain an action, is not always easy to determine. No general rule for determining it has been laid down which can readily be applied to every case. Where to draw the line between cases where the injury is more general or more equally distributed, and cases where it is not, where, by reason of local situation the damage is comparatively much greater to the special few, is often a difficult task. In spite of all the refinements and distinctions which have been made, it is often a mere matter of degree, and the courts have to draw the line between the more immediate obstruction or peculiar interference, which is a ground for special damage, and the more remote obstruction or interference, which is not. It seems to us that in this case the obstruction is sufficiently immediate, and the interference sufficiently peculiar to plaintiff, to constitute special damage to him.

It can readily be seen that obstructing at one point an alley only 20 feet wide may render it practically useless at all other points in the same block, as it is too narrow to drive in and turn around in it. To say that the abutting owner is not specially damaged by obstructing access to his lot in the rear when he has access to it by a street in the front is much the same as saying that he is not damaged by obstructing the back door to his house when he has a front door. The rear entrance to the lot is generally used for different purposes from the front entrance. Besides, a public alley is generally used more by the abutting owners, and less by the public, than an ordinary street. As held in *Aldrich v. Wetmore*, 52 Minn. 164, (53 N. W. 1072,) it is not necessary that access to the street be wholly and completely cut off to cause the abutting owner special damage. We cannot see that the allegation that the roundhouse and other struc-

tures partly on this alley emit smoke, dirt, and soot alleges any element of damage. As far as appears by the complaint, the defendants are carrying on a lawful business, partly on other premises, and we cannot see that the fact that the structures in which the business is carried on are partly on this alley will render this business itself unlawful.

The order appealed from should be affirmed. So ordered.

COLLINS and BUCK, JJ., absent.

(Opinion published 59 N. W. 498.)

STATE OF MINNESOTA *vs.* MICHAEL M. MADIGAN.

Argued May 24, 1894. Affirmed June 11, 1894.

No. 3843.

Perjury in affidavit for an attachment.

Where, in an indictment for perjury, it is assigned as perjury that the accused in an affidavit for attachment swore falsely that he was the attorney for the plaintiff in the attachment suit, *held* it is not necessary to allege in the indictment that the accused was an attorney at law.

Statement that deponent is attorney for the plaintiff is material.

Held, though the statute does not require it to appear in the affidavit for attachment that such person making the affidavit is the attorney for the plaintiff therein, his right to make it must affirmatively appear somewhere in the attachment proceedings before the writ can rightfully issue, and it may properly appear in such affidavit, and is material, and, if knowingly false, perjury may be assigned upon it.

Materiality not averred but shown by facts stated.

Held, it is not necessary to aver in an indictment that matter assigned as perjury is material, when it appears from the facts set out in the indictment that it is material.

Proof that the oath was administered.

Held, the production of an affidavit regular in form, with proof that the accused signed it, and that the officer before whom it purports to be sworn to, signed the jurat and affixed his seal, is sufficient evidence on the trial on such an indictment that the accused actually swore to the affidavit.

57	425,
59	21
57	425
56	10

Evidence not rendered incompetent.

If the evidence offered tends to prove the commission of the crime charged in the indictment. It is not incompetent because it also tends to prove the commission by the accused of another crime.

Charge to jury correct.

Held, the assignments of error as to the charge are not well taken.

Finding of the trial court on conflicting affidavits, conclusive.

Where the affidavits in support of a motion are contradicted by counter affidavits, the finding of the court below on the disputed facts is conclusive if there is any evidence to sustain it.

Jurors drinking intoxicating liquor on a trial for felony.

Where some of the jurors drank intoxicating liquor during the trial, but before retiring to consider their verdict, *held*, on a motion for a new trial, this raises a presumption against the validity of the verdict, which may be rebutted by showing that in fact such jurors were not intoxicated.

Juror's ignorance of English as a ground for a new trial.

Held, it is not error to deny a motion for a new trial made on the ground that one of the jurors did not understand the English language, when the moving party had an opportunity to ascertain that fact, and challenge the juror for that cause before he was sworn.

Appeal by defendant, Michael M. Madigan, from an order of the District Court of Redwood County, *B. F. Webber, J.*, made March 8, 1894, denying his motion for a new trial.

Defendant was indicted by the grand jury on November 18, 1893, for the crime of perjury in swearing before a Notary Public on April 5, 1893, to an affidavit stating that he was attorney for Peter N. Romnes and that Halver T. Helgeson and Ole H. Mogan were indebted to Romnes in the sum of \$500. Helgeson and Mogan were partners dealing in merchandize at Belview and were insolvent and applied for advice to Madigan who was an attorney practising at Redwood Falls. He recommended them to make an assignment under Laws 1881, ch. 148, and overlooking laws 1889, ch. 30, amending that statute, had them make a note to Romnes for \$500 antedated April 27, 1892, due November 1, 1892, on which he brought suit in Romnes' name April 5, 1893, and made this affidavit for and obtained a writ of attachment. They then assigned. They owed Romnes nothing and he never employed Madigan. The place of trial upon the indictment was on Madigan's motion changed to Brown County and he was on January 27, 1894, found guilty and

sentenced to confinement at hard labor in the State Prison at Stillwater for the term of three years and three months. He afterwards on affidavits and a settled case moved the court for a new trial, but was denied and he appeals.

H. J. Peck and Jos. A. Eckstein, for appellant.

The indictment does not allege that the defendant was an attorney at law. It should show that defendant was a person authorized to swear on this particular occasion, and in this particular proceeding. An oath taken by one not authorized to take it is an extrajudicial oath and perjury cannot be assigned upon it. *State v. Helle*, 2 Hill (S. C.) 290; *United States v. Grottkau*, 30 Fed. Rep. 672; *State v. Hamilton*, 7 Mo. 300; *Lamden v. State*, 5 Humph. 82.

The statute provides what shall be put into an affidavit for an attachment, but it does not require it to state that it is made by the plaintiff, his agent or attorney. If it is in fact made by one or the other then the law has been complied with. That allegation was immaterial and the court erred in charging the jury it was material. 1 *Hawkins P. C.* 433, 435; *State v. Lawson*, 98 N. Car. 759; *Miller v. State*, 15 Fla. 577; *Wood v. People*, 59 N. Y. 117; *Pollard v. People*, 69 Ill. 148.

There is no evidence that the defendant was actually sworn except the jurat of the notary. The notary was on the witness stand, but was not asked the question. The defendant testified that he presented the affidavit to him and the notary signed it without any other act. The oath was not in fact administered. To constitute perjury the oath should have been administered and the proof should have been clear that the defendant was sworn. *Case v. People*, 76 N. Y. 242; *United States v. McConaughy*, 33 Fed. Rep. 168.

The court erred in allowing proof that Roumnes did not sign the bond for attachment issued in the action and in receiving the bond in evidence. *Hoberg v. State*, 3 Minn. 262; *State v. Hoyt*, 13 Minn. 132.

The court erred in refusing a new trial on the ground of the misconduct of the jury during the trial. 1st. Because the jury separated after the charge of the court and before they retired to deliberate on their verdict. 2nd. Because of the intoxication of some

of the jurors during the trial. *Peterson v. Siglinger*, 3 S. Dak. 255; *State v. Bullard*, 16 N. H. 139; *Jones v. State*, 13 Tex. 168; *Ryan v. Harrow*, 27 Ia. 494; *Green v. State*, 59 Miss. 501.

H. W. Childs, Attorney General, *Geo. B. Edgerton*, his assistant, and *S. L. Pierce*, for the state.

The fact that the person making the affidavit for an attachment is agent or attorney for the plaintiff must be made to appear, before the court can order the issuance of the writ. The person making the affidavit is required to state that he is the agent or attorney of the plaintiff in the affidavit, not because expressly required by the statute, but because required by manifest implication. Unless this fact is stated in the affidavit we submit that it is fatally defective. *Wiley v. Aultman & Co.*, 53 Wis. 560; *Miller v. Chicago, M. & St. P. Ry. Co.*, 58 Wis. 310; *People ex rel. v. Sutherland*, 81 N. Y. 1; *Ex parte Bank of Monroe*, 7 Hill, 177; *Ex parte Shumway*, 4 Denio, 258.

The indictment is sufficient if it appear from the facts set forth in it that the matter sworn to and upon which the perjury is assigned was material.

In prosecutions for perjury the jurat is *prima facie* evidence that the officer administered the oath. *King v. Morris*, 1 Leach 50; affirmed in 2 Burr. 1189; *Regina v. Turner*, 2 Car. & Kir. 735; *Commonwealth v. Warden*, 11 Met. 406; *People ex rel. v. Sutherland*, 81 N. Y. 1; *O'Reilly v. People*, 86 N. Y. 154.

CANTY, J. The defendant was indicted by the grand jury of Redwood county, and charged with the crime of perjury in making an affidavit for attachment in a case entitled "Peter N. Romnes against Halver T. Helgeson and Ole H. Mogan," commenced in the District Court of that county, and in which affidavit it is charged he deposed that he is the attorney of that plaintiff, and that a cause of action exists in favor of plaintiff and against defendants, the amount of which is \$500, and the ground of that claim is a promissory note executed and delivered by defendants to plaintiff for that sum, of which note plaintiff is the holder; said indictment further charging

that all of the same is false. The defendant was convicted and sentenced, and appeals to this court.

1. The first point made by appellant is that the indictment does not state facts sufficient to constitute a public offense because it does not allege that he was an attorney at law when he made this affidavit; that no one but the plaintiff, his agent or attorney, is authorized by statute to make such an affidavit; and that, if he was not authorized by statute to make the affidavit, it was not perjury to make it. This amounts to the proposition that the affidavit might be too false to be perjury; that his swearing falsely that he is the attorney of the plaintiff is not perjury, because it might also be a false statement that he is an attorney at all. This is not like the case of *United States v. Grottkau*, 30 Fed. Rep. 672, cited by appellant, where it affirmatively appeared on the face of the proceedings in which the affidavit was made that the person making it was prohibited by statute from doing so. Here it was made to appear by the alleged false statement itself, which is a part of the affidavit, that he was authorized to make that affidavit, and nothing appeared to the contrary in the attachment action or proceedings. The point is not well taken.

2. While the statute requires the affidavit for attachment to be made by the plaintiff, his agent or attorney, it does not require the affidavit to state that the person making it is such agent or attorney when made by him. It is contended by appellant that therefore the statement in the affidavit that he was attorney for the plaintiff, Romnes, was immaterial, and perjury cannot be predicated upon it. It does not necessarily follow that this statement was immaterial because not required to be stated in the affidavit. The statement was of a material fact which it was necessary to make appear affirmatively somewhere in the proceedings before a writ of attachment could rightfully issue, and it was proper to make it appear in this affidavit. Even if it appeared elsewhere, it might also appear in the affidavit as corroborative evidence of the fact, and in such case also it would be material.

3. While the indictment alleges that the affidavit is material, there is no formal averment that the parts of the affidavit assigned as perjury as aforesaid are material, and it is contended that for this reason the indictment is bad. Such formal averment is not neces-

sary when it appears from the facts set out in the indictment that the matter assigned as perjury is material. It does so appear in this case. The indictment sets out the affidavit at length, and avers that it was made for the purpose of procuring an order for the issuance of a writ of attachment in that action then and there commenced. From these facts it sufficiently appears that the matter assigned as perjury was material. A writ of attachment would not issue until the things stated in this matter were made to appear.

4. It is contended that it does not sufficiently appear by the evidence that defendant was actually sworn to the affidavit. The notary public before whom the affidavit purports to have been made and sworn to, testified that defendant signed the affidavit, and he signed it and affixed his seal to it as notary, and identified the signatures and seal. The affidavit was then received in evidence. This was sufficient authentication. Besides, the notary was also the court commissioner, and defendant, on his own behalf, testified that he was retained by the plaintiff in that case, and had authority to make the affidavit. He testified: "I went down to the court commissioner's, and presented it there, and had him make his order for attachment, as is shown by the files in this case. I had the affidavit all written out and signed, and everything, and I handed it to him, and I don't remember just exactly what remark I made or he made, but he says, 'That your signature?' And I said, 'Yes,' and he took the affidavit." He further testified that he paid the commissioner his fee, who, as notary, signed the affidavit for attachment, and, as commissioner, signed the order for attachment. "I had the attachment proceedings made out, and I went up to the clerk of court, and filed them there, and had the writ of attachment issued. Q. Now, Mr. Madigan, at the time you made this affidavit, state whether or not you made it in good faith, believing it to be true when you wrote it. A. I certainly did. If I ever did anything in good faith, it was that. I wouldn't be foolish enough to go and commit perjury for nothing at all, nor for any sum of money. I wouldn't do it." It seems to us that this testimony, both expressly and by every implication, admits that this affidavit was actually sworn to.

Neither do we wish to be understood as holding that it was necessary to prove by oral evidence that the affidavit had been sworn to. In *King v. Morris*, 1 Leach, 50, reported also in 2 Burrow, 1189, the

defendant was convicted before Lord Mansfield on the mere proof that the signature subscribed to the affidavit was in his handwriting, and that the jurat was subscribed by the officer before whom the affidavit purported to be sworn to, but no further proof was given to identify the defendant as the person sworn, or that any person was so sworn. It was held by the court that the evidence was sufficient. See, also, *Reg. v. Turner*, 2 Car. & Kir. 732. It is true that such presumption may be rebutted by affirmative evidence showing that in fact the affidavit was not sworn to. *Case v. People*, 76 N. Y. 242. Merely subscribing to the affidavit is not being sworn to it. *O'Reilly v. People*, 86 N. Y. 154. But it is well settled that, when the signatures are proved as above stated, it is presumed that it was actually sworn to by the person whose signature is subscribed as affiant.

5. Romnes, the plaintiff in that action, testified, on behalf of the state, that he never retained defendant to commence that action, never authorized it to be commenced, never was in defendant's law office, and never had any business with him until long after the time that action was commenced. Defendant on his own behalf, and some of his witnesses, testified that Romnes was in his office at that time, and also gave evidence tending to prove that Romnes then and there signed the bond for attachment in that action. Defendant testified that he signed the bond as a witness, and took the acknowledgment of Romnes to it, all of which appears by the bond; that he procured the approval by the court commissioner of the bond, and filed it with the clerk of the court as a part of the attachment proceedings.

On rebuttal, Romnes testified that he did not sign the bond, and Helgeson, one of the defendants in that action, testified that he signed the name of Romnes to the bond in defendant's office, and that Romnes was not there. Other evidence was offered that the bond was a forgery, and thereupon it was received in evidence. All of this evidence was received against defendant's objection and exception, and is now assigned as error.

We are of the opinion that this evidence was competent. It certainly was material on the question of whether or not defendant was the attorney of Romnes. If Romnes had signed this bond, it was

a strong circumstance to prove that defendant was his attorney. If he had not signed it, but the bond was a forgery, it was a strong circumstance to prove that defendant was not his attorney. If the evidence tends to prove the commission of the crime charged, it is not incompetent because it also tends to prove the commission of another crime.

6. We find no error in the charge of the court.

7. On the motion for a new trial, affidavits were read, stating that, after the jury were charged, a recess was taken by the court for about ten minutes, and the jury were allowed to and did separate. This is all denied by counter affidavits, and stated by the court below to be untrue, both on the affidavits and of his own knowledge. This finding is conclusive that no such recess was taken, and that the jury did not separate.

8. Misconduct of the jury was one of the grounds of the motion for a new trial, and affidavits were read in support of the motion, stating that two or three of the jurors were intoxicated,—some of them every night during the trial. This is all denied by a number of counter affidavits, and the court finds it is untrue, and that finding is conclusive.

But one of the jurors in his counter affidavit admits that he drank intoxicating liquor during the trial. "Affiant is in the habit of taking a drink of beer or wine when he feels like it, but never drinks spirituous liquors for other than medicinal purposes; that affiant never mixes his drinks; that, during the trial, affiant did not take more than five drinks in any one day, and, when he did drink, there was a long time between drinks; that affiant has never been intoxicated or under the influence of intoxicating liquors with the exception of one occasion, when affiant was in the army."

The question now arises: Is the drinking of intoxicating liquors by a juror during the trial ground *per se* for a new trial? There are a few cases which so hold, but they are contrary to the great weight of authority, which is that such drinking raises more or less of a presumption against the verdict, which may be rebutted by showing that the juror was not in fact intoxicated. The cases of *State v. Bullard*, 16 N. H. 139, and *Jones v. State*, 13 Tex. 168, cited by appellant, were cases where the jurors procured the liquor after

they had retired to consider their verdict. In the case of *Ryan v. Harrow*, 27 Iowa, 494, cited by appellant, the statement of facts in the commencement of the opinion is as follows: "During the progress of the trial, and after the cause was submitted to the jury, and before they had agreed upon a verdict, two or more of the jury drank intoxicating liquors." It seems to us that, where the intoxicating liquor is procured and drunk after the jury have retired to consider their verdict, it is a very different question. It then involves the misconduct of both the jurors and the officer having them in custody, and will easily raise a presumption of positive bad faith. But if the juror is intoxicated while performing his duties in open court, the parties have an opportunity to observe it and bring it to the attention of the judge. It is also a different question if the juror drank at the expense of the prevailing party, or those working in his interest, which was also claimed by the affidavits and denied by the counter affidavits in this case, and found against appellant by the court below. If, as in this case, the court below finds that the juror was not intoxicated, and the moving party is not in fact prejudiced, the verdict should be allowed to stand. This position is not in conflict with the case of *State v. Parrant*, 16 Minn. 178 (Gil. 157), which was a trial for murder in the first degree. In such a case, if the jury are allowed to separate at all during the trial, their conduct while separated is subject to closer scrutiny.

9. That one of the jurors did not understand the English language is also made a ground for a new trial. The affidavits on this question were also conflicting; and for this reason, and also for the reason that it was a ground for challenge, and, by the exercise of reasonable care, the defendant might have discovered the fact, and availed himself of his right to reject the juror when the jury was being impaneled, the point is not well taken.

This disposes of all the questions raised on the appeal, and the order appealed from should be affirmed. So ordered.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 490.)

v.57M.—28

LUTHER Z. ROGERS *vs.* LE SUEUR COUNTY *et al.*

(Submitted on briefs June 1, 1894. Affirmed June 11, 1894.)

No. 8822.

Power of a county to incur debts.

1878 G. S. ch. 8. §§ 85, 86 and ch. 11, §§ 49, 114, construed. *Held*, the board of county commissioners has no power to incur liability for the county, which, with the ordinary current yearly expenses and other liabilities payable within a year, will exceed both the amount of funds in the county treasury and the maximum amount which can be assessed as one year's taxes for county purposes according to the tax lists on file when the contract is made under which the liability will be incurred.

Anticipating uncollected taxes.

Held, further, the board cannot, in addition to anticipating the above resources, in incurring liability, also anticipate uncollected taxes. It has no power to anticipate in a year more than a year's uncollected taxes assessed at the maximum rate.

Same—qualification.

Held, further, it is not intended by this to hold that taxes assessed during the previous year for a specific purpose cannot be applied to that purpose during the present year before they are collected.

Bonds to build courthouse.

Held, further, under the general laws of this state the board has no power to issue bonds for the erection of a courthouse.

Appeal by the defendants, the Board of County Commissioners of the County of Le Sueur, O. H. Chapman, Chairman, and Michael Keogh, County Auditor, from an order of the District Court of Le Sueur County, *Frances Cadwell, J.*, made March 13, 1894, refusing to dissolve an injunction.

The plaintiff, Luther Z. Rogers, filed his complaint February 13, 1894, stating that he is a citizen and taxpayer of Le Sueur County, that the taxable property in that county is \$4,446,310, that on July 20, 1893, the board of county commissioners resolved to build a new courthouse at a cost of \$40,000 and to issue and sell negotiable bonds for that amount to pay the expense and are now about to contract for its construction and to involve the county in debt and to pledge the credit of the county for that sum and unlawfully increase the rate of taxation; that the previous indebtedness of the county over

57	434
58	425
57	434
81	58

and above money in the treasury is \$7,000, that the board in July, 1893, levied on the taxable property \$18,000 to pay current expenses for the fiscal year, all of which will be required for that purpose. He prayed that defendants 'be enjoined from building such new courthouse and from making any contract therefor and from pledging the credit of the county for such purpose and from executing and selling the bonds of the county and from levying a tax for any and all county purposes in excess of five mills upon the dollar of assessed valuation of the taxable property therein. On this complaint and affidavits in support thereof the plaintiff obtained an order for and sued out a temporary injunction restraining defendants from issuing such bonds and from making or incurring any indebtedness for a new courthouse until the further order of the court in the premises.

The defendants answered that they were about to issue courthouse bonds for \$40,000 payable between January 1, 1895, and 1914, with interest semiannually at the rate of five per cent per annum; that on January 1, 1894, the indebtedness of the county was \$4,167.36, that in addition thereto there were ditch contracts outstanding to the amount of \$2,136, and that since January 1, bills had been allowed and warrants issued for \$2,074.61 more. They further answered that the resources of the county on January 1, 1894, were as follows, viz: County revenue, current and delinquent taxes uncollected, \$20,640.60; Courthouse fund uncollected, \$3,124.80; County ditch liens and interest, \$7,580.43; Available cash in treasury, \$1,663.22; Making total assets, \$33,011.05. They further set forth at considerable length the present inconvenience and showed the pressing necessity for a new courthouse.

On this answer and supporting affidavits the defendants moved the court to dissolve the temporary injunction. After argument the court modified the injunction so as to permit the board to make in the year 1894 any contract which would not involve the county in any pecuniary liability in excess of \$7,355.35, but in proceeding to erect a courthouse the board were restrained from making in any year any contract whereby a liability on the part of the county would be incurred which would render it necessary, to meet the same and the current expenses of the county, to levy a tax in excess of five mills on the dollar.

In a note filed with the order the court said, the board has the power and it is its duty to provide a suitable courthouse. 1878 G. S. ch. 8, §§ 85, 86, 110. But it has no power to borrow money and issue bonds therefor or to make any contract during any year whereby it will be necessary, in order to pay the debt so incurred and meet the current expenses of the county, to levy a tax in excess of five mills on the dollar. 1878 G. S. ch. 11, § 114. *Chaska Co. v. Carver Co.*, 6 Minn. 204, was decided prior to this statute. The present rule is expressed in *Goodnow v. Commissioners of Ramsey Co.*, 11 Minn. 31; *Johnston v. Becker Co.*, 27 Minn. 64. Counties have not the power to borrow money and issue commercial paper unless it is given by express legislation. *Claiborne Co. v. Brooks*, 111 U. S. 400.

From the order defendants appeal.

M. R. Everett, Thos. Hessian and Charles C. Kolars, for appellant.

The board has power to borrow money for the purpose of building a courthouse. 1878 G. S. ch. 8, §§ 86, 110, 111, confer that power upon it. In *Chaska Co. v. Carver Co.*, 6 Minn. 204, this question was decided in the affirmative. That decision was affirmed in *Nininger v. Carver Co.*, 10 Minn. 133, and in *Cushman v. Carver Co.*, 19 Minn. 295. It has also been recognized in *Auerbach v. Le Sueur Mill Co.*, 28 Minn. 291, and in *Sullivan v. Murphy*, 23 Minn. 6. Nothing antagonistic to this view appears in *Johnston v. Becker Co.*, 27 Minn. 64.

W. C. Odell, for respondent.

To meet the current expenses of Le Sueur County for the present fiscal year, a levy was made in the sum of \$18,000. An additional levy for courthouse purposes was made in the sum of \$3,124.80. Making the gross amount of the tax levy for the present fiscal year \$21,124.80, or within \$1,106.75 of the limit of tax levy prescribed by law. With this condition of things the board is about to contract for the erection of a new courthouse to cost \$40,000, and to sign, issue and negotiate the interest bearing bonds of the county in that sum to raise money with which to pay the cost. The spirit of 1878 G. S., ch. 11, § 114, is to prevent boards of county commissioners

from creating any indebtedness which cannot be paid with funds then available and by the tax levy of the current year. *Niles Water Works v. City of Niles*, 59 Mich. 311; *Johnston v. Becker Co.*, 27 Minn. 64.

Boards of County Commissioners are prohibited from exercising any power other than such as is expressly given by law, or is necessary to those which are granted. 1878 G. S. ch. 8, § 114. *Borough of Henderson v. County of Sibley*, 28 Minn. 515.

CANTY, J. On the 20th of June, 1893, the board of county commissioners of Le Sueur county passed a resolution in which they resolved to build a new courthouse for the county at a cost of \$40,000, and on February 5, 1894, applied to the board of investment of the state school fund for the loan of that sum, to be used for that purpose; and defendants allege in their answer that said board of investment granted their application.

The plaintiff, a property owner and taxpayer of the county, then brought this action to restrain the incurring of said indebtedness, and the issuing of bonds therefor, and procured a temporary writ of injunction against the board of county commissioners and county auditor. On filing their answer, defendants moved to dissolve said injunction, and upon the hearing the injunction was modified, so that the part which enjoined the issuing of bonds was allowed to stand. The injunction was also allowed to stand to the extent of enjoining the defendants from entering into any contract whereby a pecuniary liability on the part of the county shall be incurred during the year 1894 in excess of the sum of \$7,355.35, which includes \$3,124.80 of taxes levied by the board on the taxable property of the county in 1893, or whereby a pecuniary liability shall be incurred during the year 1894 which, with the current expenses of the county for the year, will exceed a tax levy of five mills on the dollar of the taxable property of the county, and from incurring any such liability during any subsequent year which will exceed such limit for that year. To this extent the motion was denied, and in other respects granted. From this order the defendants appeal.

It is contended by appellants that, the county being in need of a courthouse, it was the duty of the county commissioners to provide one, and that, therefore, they have the right to incur indebted-

ness for that purpose; and cite authorities which so hold on general principles. In this case the question is not governed by such general principles, but by the express words of the statute, on which this court has already passed. It is true that 1878, G. S. ch. 8, § 85, provides that "the powers of the county as a body politic and corporate can only be exercised by the board of county commissioners thereof or in pursuance of a resolution by them adopted;" and section 86 provides that "each county organized for judicial purposes shall provide at the county seat a suitable courthouse and a suitable and sufficient jail and fire proof offices and other necessary buildings and keep the same in good repair;" and sections 110 and 111 make further provisions as to providing and furnishing such offices.

But the right to incur indebtedness for such purposes, and all other general county purposes, is limited by 1878 G. S. ch. 11, §§ 49, 114. Section 49 provides: "There shall be levied annually on each dollar of taxable property in the state (other than such as by law is otherwise taxed) as assessed and entered on the tax lists for the several purposes enumerated, taxes at the rates specified as follows: * * * For county purposes, such amount as may be levied by the county commissioners, the rate of which shall not exceed five mills in any county having a taxable valuation of one million dollars or more."

Section 114 provides: "It shall be unlawful for the corporate authorities of any county * * * unless expressly authorized by law, to contract any debt, or incur any pecuniary liability, for the payment of either the principal or interest for which, during the current year or any subsequent year, it will be necessary to levy on the taxable property of such county * * * a higher rate of tax than the maximum rate prescribed by this act, and every contract made in contravention of the provisions of this act shall be utterly null and void in regard to any obligation thereby imposed on the corporation on behalf of which such contract purports to be made."

When the case of *Johnston v. County of Becker*, 27 Minn. 64, (6 N. W. 411,) arose, all of these statutory provisions were in force. The sections have since been numbered differently, and the language slightly changed in some instances, but, as will be seen by a reference to that case, the powers of the board of county commissioners, and the same question of restriction of those powers, were there involved as are here involved. It was there held that the board ex-

ceeded its powers in attempting to incur indebtedness for the construction of a county jail. It was held that by the acts of the board the county could incur no liability exceeding the amount which could be raised by the maximum rate of taxation for county purposes in one year according to the tax lists on file when the contract was made under which the liability is incurred; and the fact that the indebtedness so incurred may not be payable that year, or before new tax lists are filed, and another year's taxes levied, makes no difference; that the board cannot anticipate the future. That case is decisive here. But there are several questions in this case which do not appear in that. There the amount of liability incurred by the one contract exceeded the amount which could be assessed as one year's taxes, and the court held the contract void. Nothing appears in the case as to other liabilities or other assets. In this case it is admitted by the answer that the ordinary current expenses of the county for the year will be about or nearly \$18,000.

We are of the opinion that the board has no authority to incur liability on the part of the county which, with the ordinary current yearly expenses and other liabilities payable within the year, will exceed the amount of available funds in the treasury, and the amount which can be assessed as one year's taxes according to the tax lists on file when the contract is made under which the liability is incurred.

It also appears in this case that, besides said sum of \$3,124.80, levied for courthouse purposes, there are uncollected delinquent taxes due the county amounting to \$20,640; also about \$7,000 of "ditch liens," and there is also a small amount in the treasury. But there is also between \$6,000 and \$7,000 of outstanding indebtedness,—nearly enough to absorb all the available assets except the \$20,640 of uncollected delinquent taxes.

The language of said section 114 will not bear the construction that it was the intention of the legislature to permit the board to anticipate uncollected taxes in incurring liability. It must be assumed that ordinarily as much of this year's taxes will remain uncollected next year as remains of last year's taxes uncollected this year. Such a construction would give the board power to anticipate in a year more than one year's uncollected taxes assessed at the maximum rate. Besides, for all that appears in this case, the

\$20,640 of uncollected taxes may be a mere residue, remaining delinquent for many years past. Such a residuum is much like the residuum of uncollected accounts on a merchant's books remaining after years of business. No board would have a right to expect that all, or even a large part of, such a residuum of uncollected taxes would be collected within a year. But we do not wish to be understood by this as holding that the board cannot contract on the faith of the \$3,124.80 levied by the board for courthouse purposes in 1893,—the year previous. That question is not before us on this appeal.

It is stated in both the complaint and answer that the taxable valuation of the county is in round numbers \$4,400,000, and at the rate of five mills on the dollar one year's tax would be \$22,000, and after deducting \$18,000,—the current year's expenses,—it would leave only about \$4,200 to be applied in erecting a courthouse. From what has been stated, it is apparent that the board can contract only from year to year, with reference to the expected annual income. It also necessarily follows that the board has no authority to issue bonds. *Goodnow v. Board of Com'rs*, 11 Minn. 31 (Gil. 12), is still authority on this point. The statutes controlling this question are substantially the same now as then. Appellants cite *Chaska Co. v. Board Sup'rs Carver Co.*, 6 Minn. 204 (Gil. 130); *Nininger v. Commissioners of Carver Co.*, 10 Minn. 133 (Gil. 106); and *Cushman v. Commissioners of Carver Co.*, 19 Minn. 295 (Gil. 252),—to the effect that the board has authority to issue bonds for the erection of a courthouse. Those cases arose under the statute of 1857, by which the board was given power to erect a courthouse and jail, without any restriction whatever. In fact the restrictions in an earlier statute were stricken out by amendment.

The board has still the power to build a courthouse, but under the restriction above stated; and whether it is the best policy to be compelled to contract from year to year with reference to the expected annual income or else to accumulate a fund in the treasury before commencing or contracting for the erection of the structure, instead of incurring at once a liability which it may take years to pay, is a question for the legislature, and not for the courts.

The order appealed from should be affirmed. So ordered.

COLLINS and BUCK, JJ., absent.

(Opinion published 59 N. W. 488.)

ISAAC W. WEBB *vs.* W. H. FISHER.

Submitted on briefs April 23, 1894. Affirmed June 12, 1894.

No. 8690.

A single exception to two or more refusals to charge.

Held, that a general exception to the refusal of the court to charge as requested by counsel for defendant, the request embracing three propositions, one of which was clearly unsound, was not well taken.

Other rulings.

Other rulings of no particular consequence disposed of.

Appeal by defendant, W. H. Fisher, from an order of the District Court of Polk County, *Gorham Powers*, J., made November 10, 1893, denying his motion for a new trial.

The plaintiff, Isaac W. Webb, by his complaint alleged that between November 1, 1889, and January 23, 1891, he sold and delivered to defendant at his request twenty tons of hay worth \$6 per ton and thirty three cords of wood at \$3.50 per cord, that defendant paid thereon \$36 in work and \$23.40 in freight on the wood, but no more, and demanded judgment for the balance, \$176.10 and interest. Defendant by answer admitted that he bought and received the wood at \$3 per cord and paid the freight, \$23.40, and denied that he bought or received the hay. He further alleged that at plaintiff's request he performed labor for plaintiff with men, teams and machinery to the value of \$72.60 and offered judgment for the balance, \$3. Plaintiff's reply was a general denial.

At the trial December 8, 1892, plaintiff gave evidence tending to prove that he bought of the Great Northern Railway Company the grass standing in 1889, on a quarter section of its land, and that defendant by his agent agreed with plaintiff to cut, cure and stack the hay and have therefor one half of it, that defendant drew away one half of the hay at the time he cut it and in November came and took away the other half. The defendant requested the Judge to charge the jury as follows:

- 1st. If you find there was no agreement for cutting hay on shares, and none cut for Webb, the claim for hay sold must be disregarded.
- 2nd. If you find that Webb merely sold the uncut grass, all claim

57	441
67	67
57	441
70	105

for hay sold must be disregarded. 3rd. If you find that Webb merely sold all the hay alleged to have been cut by Fisher's men, due allowance must be made for the value of the services required in making the hay.

The settled case then states that, "the Judge refused to so instruct the jury and that defendant duly excepted to the refusal."

The jury returned a verdict for plaintiff and assessed his damages at \$104.72. Defendant moved for a new trial. Being denied he appeals and assigns errors as follows:

The court erred: 1st. In overruling objections to plaintiff's testimony to the cutting of grass by defendant's employees. 2nd. In refusing defendant's offer to show the value of the grass (or hay) standing and uncut. 3rd. In denying defendant's motion to strike out plaintiff's testimony as to defendant's cutting grass. 4th. In refusing to charge the jury that "If you find that there was no contract for cutting hay on shares and none cut for Webb, the claim for hay sold must be disregarded." 5th. In refusing to charge the jury that "If you find that Webb merely sold the uncut grass, all claim for hay sold must be disregarded." 6th. In charging the jury in substance that in all events the plaintiff is entitled to recover the reasonable value of the hay in stack to the extent of twenty tons.

F. M. Catlin, for appellant.

Wm. Watts, for respondent.

COLLINS, J. Under the pleadings in this action, it was clearly competent for plaintiff to show that defendant's men, under the direction of his farm foreman, cut grass for defendant belonging to the plaintiff, made hay thereof and stacked it upon the meadow under an arrangement that, when stacked, plaintiff and defendant should each own half; and the value of the standing grass was immaterial, for that question was not within the issues. This disposes of the first three assignments of error.

The fourth and fifth assignments relate to the refusal of the court to charge as requested by defendant's counsel. Their requests embraced three propositions, the last having little or no connection with the first and second. All were refused, and but one general exception taken to the refusal. Without doubt, the third proposition was properly rejected, and the counsel does not now claim

to the contrary. So that the general exception is of no avail. Even if this were not the fact, the first proposition, substantially, that the plaintiff could not recover if the jury should find that there was no agreement for cutting the grass on shares, and none cut for plaintiff, was unsound. As to this the court properly charged that if defendant's men were trespassers when cutting, stacking, and carrying the hay away, the plaintiff had a right to waive the trespass, and sue as for hay sold and delivered; and the matters found in the second proposition were fully covered in the general charge.

What has been said above in reference to the charge as to plaintiff's right to waive the trespass disposes of the sixth assignment of error. It has no merit.

Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 537.)

NICHOLAS P. VALERIUS *vs.* TEDY RICHARD *et al.*

Argued April 23, 1894. Reversed June 12, 1894.

No. 8577.

New trial for errors of law not excepted to.

In civil actions the power of the trial courts to grant new trials is limited to the grounds specified and prescribed in 1878, G. S. ch. 66, § 253. It follows that for errors of law occurring upon the trial, but not excepted to, a new trial cannot be granted. Canty, J., dissenting.

Appeal by Tedy Richard, Louis Berry and fourteen others, defendants, from an order of the District Court of Polk County, *Ira B. Mills, J.*, made December 27, 1892, granting the plaintiff, Nicholas P. Valerius, a new trial after verdict for defendants.

The plaintiff, Nicholas P. Valerius, brought this action upon a promissory note made by the defendants November 28, 1890, by which they promised to pay Kingsland Bros. or order \$2,000 in installments, \$500 in one year, \$700 in two years and \$800 in three

years thereafter, with interest annually at the rate of eight per cent per annum. Plaintiff alleged that he bought the note in good faith for value and that it was indorsed to him before the first installment fell due, that the \$500 and one year's interest on the whole have fallen due and remain unpaid and he asked judgment for the same. The defendants by answer denied that they made the note and denied each and every other allegation of the complaint.

On the trial May 28, 1892, the defendants gave evidence tending to show that an agent of Kingsland Bros. proposed to them that they form a corporation and each take stock therein and that the corporation buy a stallion of Kingsland Bros. for \$2,000, that defendants each thereupon signed some paper which the agent represented was an agreement to take stock. They did not dispute their signatures to the note but testified that no promise to pay money was on the paper when they signed it. The Judge charged the jury among other matters as follows, viz:

"If you find from the testimony that the note was printed on the paper but was covered over by another paper when defendants signed it they would not be liable."

No exception was taken to this part of the charge nor was there any suggestion at the trial that it was erroneous. The jury returned a verdict for defendants. The plaintiff moved for a new trial on the grounds;

1st. That the verdict is not justified by the evidence and is contrary to law.

2nd. Errors in law occurring on the trial and excepted to by plaintiff.

The Judge granted the motion and in a note attached to the order stated that he did so because of the charge above quoted. That the charge was erroneous for the reason that no evidence was given that would warrant such a finding by the jury. The defendants appeal from this order.

Wm. Watts, for appellants.

The settled case containing all the evidence in this action is voluminous. A certified copy of it is returned and filed with the Clerk of this Court, but no part of the evidence is printed in the paper

book. To save cost of printing we rest this appeal on the point that no exception was taken to the part of the charge to the jury now claimed to be erroneous. By not excepting the plaintiff waived the error. *Porter v. Chandler*, 27 Minn. 301; *Barker v. Todd*, 37 Minn. 370.

Montague & Bucklen, for respondent.

The order granting a new trial should not be reversed if there be any ground on which it can be sustained. Appellants have not seen fit to print all of the record so that this court can determine whether or not the order can be sustained on other grounds. The plaintiff made a motion before the trial court for a new trial. It was granted. He was given all he asked for. There is no reason why he should appeal from an order in his favor. If appellants are aggrieved by the order it is incumbent on them in this appeal to make it appear to this court that the order cannot be justified on the case taken as a whole, and not merely that the trial court was wrong in the reason assigned for the order. The settled case, not printed, shows that the order was the proper one to be made. The only assignment of error specified by defendants is that the reason given for making the order cannot be upheld.

COLLINS, J. At the trial of this cause, at the request of defendants' counsel, the court plainly charged the jury that, if they found a certain fact from the evidence, the defendants could not be held liable upon the note in suit. To this, counsel for plaintiff took no exception, nor was there even a suggestion that it was erroneous. The verdict being for defendants, a motion to set it aside, and for a new trial, was made by plaintiff's attorneys, on two grounds,—those specified in 1878, G. S. ch. 66, § 253, subd. 5th and 7th. Subsequently, and, as stated by the court in its order, solely because there was no evidence which warranted that part of the charge referred to above, plaintiff's motion was granted.

The phrase "contrary to law," as used in the fifth subdivision, means "contrary to the instructions." To obtain a new trial upon that ground, it must be made to appear that there was an instruction which was disregarded. It is not enough that a principle of law not embodied in an instruction was disregarded by the jury.

Hayne, New Trials, § 99; Hill. New Trials (2d Ed.) 123, 486, and cases cited.

It is apparent that the order cannot be sustained upon the second ground (seventh subdivision), that there was "error in law occurring at the trial, and excepted to by the party making the application;" for, conceding the charge to have been erroneous, plaintiff's counsel took no exception to it.

A majority of the court are of the opinion that upon the authority of *Porter v. Chandler*, 27 Minn. 301, (7 N. W. 142;) *Barker v. Todd*, 37 Minn. 370, (34 N. W. 895;) *Bergh v. Sloan*, 53 Minn. 116, (54 N. W. 943,) and cases cited,—the order should be reversed; but it has been suggested that when the court has misstated the law in its charge, or has stated propositions of law not applicable to the case, and is of the opinion that the jury was misled thereby, it has the discretion to grant a new trial, although no exception was taken. We admit that to have been the rule at common law. So the question is, has the rule been changed by statute? And it is hardly necessary to say that decisions in the courts of other states, upon statutes distinctly different from our own, cannot be regarded as applicable. Such, we think, is the case of *Emmerich v. Hefferan*, 33 Hun, 54, in which it was held that section 999, Code Civ. Proc. N. Y., had not declared that the court, at the trial, could not interpose in other cases than those mentioned, and order a new trial, when it might appear to be proper.

Again, by section 1317 of the same Code, it is provided that, on an appeal from a judgment or an order, the court at the general term to which an appeal is taken may reverse or affirm, wholly or partly, or may modify, the judgment or order appealed from, and each interlocutory judgment or intermediate order which it is authorized to review, as specified in the notice of appeal, and as to any or all of the parties, and it may, if necessary or proper, grant a new trial or hearing. Under this provision, unlike anything to be found in our statute, it has been held that on review at the general term the want of an exception at the trial was not necessarily fatal, but that the general term might, in its discretion, reverse for error not saved by exception, because, strictly speaking, it was not exercising appellate jurisdiction. It had all of the discretionary powers of the trial court. See *Mandeville v. Marvin*,

30 Hun, 282, and cases cited in Baylies, New Trial & App. 125. We fail to see that a construction of sections 999 and 1317 of the New York Code is in point here.

It has also been suggested that the court below had authority to grant a new trial for errors of law occurring at the trial, and not excepted to, under the first subdivision of section 253, supra, namely, "Irregularity in the proceedings of the court, jury, referee or prevailing party or any order of the court or referee or abuse of discretion by which the moving party was prevented from having a fair trial." Unfortunately for this contention, the parties making the application in the present case failed to specify the first subdivision as a ground for a new trial, but, as before stated, contented themselves with the grounds covered by subdivisions 5 and 7. Again, if there was anything in this position, we should have a motion for a new trial for errors of law occurring at the trial, but not excepted to, based wholly upon affidavits; for section 254 expressly provides that when the motion is made for any other cause than those mentioned in the fourth, fifth, and seventh subdivisions of section 253, it must be made upon affidavit. An "irregularity" of the court is not an error of law, by any means. Errors in law occur only when there are rulings made on questions of law; and it is very evident that no error of law in giving or refusing instructions can be reviewed, as an "irregularity" of the court, under the first subdivision. Hayne, New Trials, 29, 100.

The majority are of the opinion that, in civil actions, the power of the court to grant new trials is limited to the grounds prescribed in section 253, and that new trials for errors of law can only be granted when an exception has been taken. The statutory grounds for new trials are exclusive. Practically, this has oftentimes been held in this court, especially when considering motions made upon the ground that errors of law had occurred upon the trial, as witness the Minnesota cases before referred to. To permit a defeated party to have the benefit of an error of law not excepted to would be giving to him a great advantage; and here we are asked to go further, and allow to a party who made no objection to the giving of the erroneous instruction, and thereby actually acquiesced in its pertinency and correctness, the benefit of the error. Manifest injustice would be the result, for, had even a

suggestion been made that the court was not justified in this part of the charge, we have no doubt prompt correction would have followed. Our construction of the statute has been placed upon others substantially the same. See Hayne, *New Trials*, ch. 1, § 7; *Id.* ch. 16.

Order reversed.

BUCK, J., absent, sick, took no part.

CANTY, J. I dissent. Where the trial court has misstated the law in his charge, or charged propositions of law not applicable to the case, and he is of the opinion that in fact the jury was misled thereby, it is in his discretion to grant a new trial, though no exception was taken, if, in his opinion, the taking of an exception would not have caused him to change his mind in time to obviate the mistake. In such a case the losing party has no standing at all, as a matter of right. It is merely an application for equitable relief, addressed peculiarly to the discretion of the trial court.

In New York this is carried so far as to hold that, on review at the general term of the rulings of the judge at the trial, the want of an exception is not necessarily fatal, but the general term may, in its discretion, reverse for error not saved by exception, on the ground that it is not, strictly speaking, exercising appellate jurisdiction, but has all the discretionary powers of the trial court. Baylies, *New Trials & App.* 125; *Standard Oil Co. v. Amazon Ins. Co.*, 79 N. Y. 506; *Mandeville v. Marvin*, 30 Hun, 282; *Maier v. Homan*, 4 Daly, 168; *Lattimer v. Hill*, 8 Hun, 171; *Ackart v. Lansing*, 6 Hun, 476.

It is also in the discretion of the trial court to allow an exception after the jury has retired. *St. John v. Kidd*, 26 Cal. 267. If he has power to allow an exception after the proper time to take it, he has power to consider it taken for the purpose of a new trial.

This ground for new trial does not come under 1878, G. S. ch. 66, § 253, subd. 7, "Error in law occurring at the trial and excepted to by the party making the application," but under the first subdivision of that section, "Irregularity in the proceedings of the court, jury, referee or prevailing party or any order of the court or referee or

abuse of discretion by which the moving party was prevented from having a fair trial."

The discretionary power exercised by the court below in this case is one which a trial court, having due regard for the rights of the prevailing party will seldom exercise. It is only when he is satisfied that in fact the particular mistake produced a wrong result and that the failure to except did not prejudice the prevailing party and where he is satisfied that his rulings would have been the same, and that nothing would have been done by him or the prevailing party in time to obviate the mistake even if an exception had been taken. Even viewed by this strict rule I cannot see that the order granting a new trial was an abuse of discretion, and hold that the order appealed from should be affirmed.

Since the above was written the majority opinion has been rewritten. It is now admitted that at common law it was in the discretion of the trial court to grant a new trial for errors to which no exception was taken, but it is insisted that by the adoption of the Code this discretionary power has been cut off. It has seldom before been held that the discretionary power of a trial court of general jurisdiction has been cut off by the Code. The Code is a mere skeleton, and much of it merely declaratory of the common law. Especially is this true as to its provisions regulating practice. We do not look to it for the discretionary powers of the District Court, as we do to the justice of the peace practice act for the discretionary power of that court. On the contrary, it is not unusual to look to the great sources of authority on common law and equity practice to ascertain what the discretionary powers of our District Court are.

The point is also now made for the first time that the motion for a new trial was not made on the grounds stated in the first subdivision of section 253, but on those stated in the fifth and seventh subdivisions. As to this I will say many able judges, in times past, have often set aside verdicts on their own motion, even before the ink was dry on them, and without any motion or grounds of motion being made or stated by the party at all; and the right to do so has hardly been questioned. At common law the trial court had the power to grant a new trial, no matter how informal the application for it might be, or how much the moving party had waived his technical rights by failing to take the proper exception, or to put the proper

grounds, or any grounds at all, in his motion. When, as in the present case, a formal motion for a new trial is made, stating the grounds, it will not be presumed that it was granted on any grounds except those stated. It must affirmatively appear that it was granted on some other grounds, which it does in this case. It is a new doctrine that a trial court of general jurisdiction has no discretion to brush aside technical informalities, and prevent injustice, by granting a new trial. It has always been held that it is in the discretion of the trial court to see that injustice was not done during the progress of a trial, or afterwards, before the entry of judgment, either through its own mistakes, or the technical laches of the attorney. To sustain the position of the majority, Hayne, New Trial, is cited several times. This work is devoted exclusively to the practice as established by the California Code and decisions, rarely citing any other cases. He cites no case which sustains their position. They cite none, and I am able to find none. On the contrary, the authorities in the Code states agree with the common law on this question. Thus, in *Farr v. Fuller*, 8 Iowa, 347, the trial court granted a new trial for errors in its charge, not excepted to. The supreme court held it was discretionary. As in this case, the evidence was not returned on appeal, and the appellant claimed that no error appeared in the charge; but the supreme court held that, in favor of the order granting a new trial, it would be presumed that, as applied to the evidence, the charge was erroneous. It is also held in *Cheatham v. Roberts*, 23 Ark. 651, that it is in the discretion of the trial court to grant a new trial for error not excepted to.

The point is also now made that section 254 provides that when the motion for a new trial is made on the fourth, fifth, and seventh subdivisions of section 253, "it is made either on a bill of exceptions or a statement of the case prepared as prescribed in the next section, for any other cause it is made on affidavit," and that, therefore, this by necessary implication cuts off the common-law practice, under which the court often acted on its own knowledge of what took place in its presence during the trial, and granted or denied a new trial without regard to whether or not such knowledge was either supported or contradicted by any such affidavits. If this was purely a statutory proceeding, the position of the majority would be correct, but it is not a mere statutory proceeding. The provision that in some cases

a motion for a new trial shall be made on a case or bill of exceptions, and in others on affidavit, is simply declaratory of the common law. Such statutes do not cut off other common-law remedies, unless such other remedies are expressly prohibited. Thus, on the principles laid down by the majority, title 11 of chapter 66, prescribing the practice on application for injunction, and providing only for the temporary writ and the permanent writ, would, by necessary implication, cut off the old equity power to issue a restraining order pending the motion, but the contrary practice is well established in this state. On the same principle, on an appeal from the clerk on taxation of costs under 1878 G. S. ch. 67, § 8, the judge who tried the case could not look into the proceedings on the trial, or beyond the affidavits used on the taxation. But the contrary practice is well established. The judge practically disregards the affidavits on the question of materiality when the witnesses were sworn, and acts on his own knowledge of the proceedings had and testimony given on the trial, just as he did at common law. It is unnecessary to multiply illustrations. The judge who tried the case is not bound, by virtue of the statute, to know as little about the case after trial as the average juror is required to know before it. He is not obliged to stultify himself, and know nothing of what he saw or heard on the trial, except what the parties see fit to state to him in affidavits.

But the judge's powers and the applicant's rights are, in this respect, very different questions. The moving party not only fails to save his rights for review in the appellate court, by failing to make them appear of record, and to cover them in his grounds of motion, but he also runs the risk of having his motion denied on technical grounds, merely, by the trial court, which it usually will and ought to do. But notwithstanding this, in furtherance of justice, the trial court may relieve him from his laches, by giving him something which he asked for, but was not in a position to demand as of right. And when it affirmatively appears that the court, in granting him a new trial, has, in furtherance of justice, intentionally relieved him from his technical laches and omissions, it is merely a question whether or not, on common-law principles, it has abused its discretion. In this case it seems to me that it has not.

(Opinion published 59 N. W. 534.)

HARRIET L. ORTMAN *vs.* SAMUEL H. CHUTE *et al.*

Argued May 8, 1894. Affirmed June 12, 1894.

No. 8752.

A quitclaim deed of husband and wife will bar her dower.

A married woman who joins with her husband in a deed of conveyance whereby, under their hands and seals, and for an expressed consideration of one dollar, they grant, bargain, sell, and quitclaim certain real estate to another, which formerly belonged to the husband, but has been sold to satisfy an execution issued on a judgment against him, has no inchoate interest in the land which can ripen into an estate upon the death of her husband.

Appeal by plaintiff, Harriet L. Ortman, from an order of the District Court of Hennepin County, *Charles M. Pond, J.*, made September 4, 1893, denying her motion for a new trial.

On September 13, 1877, Ernest Ortman owned in fee Lots 3, 4, 5, 6 and 7 in Block 20 in Mill Company's Addition to St. Anthony Falls, now a part of the City of Minneapolis. The plaintiff was his wife. On that day these lots were sold by the sheriff to Samuel Chute on a writ of execution to satisfy a judgment recovered by Catharine Theilin against Ernest Ortman. The lots were not redeemed. On June 28, 1881, plaintiff and her husband in consideration of \$100 paid them by Samuel Chute and his brother, Richard Chute, made to them a quitclaim deed of the lots. The consideration expressed in the deed was one dollar. Ernest Ortman died intestate December 24, 1890. The plaintiff as his widow now claims to have inherited from her deceased husband one undivided third of these lots and contends that she did not by joining in the quitclaim deed release or convey her inchoate right of dower therein; or thereby assent to any conveyance thereof by her husband, as his title had passed by the sale on execution. She prayed partition of the lots between her and Samuel Chute. On the trial the court overruled her contention and she excepted. Findings were filed and judgment ordered for defendants. Plaintiff moved for a new trial. Being denied she appeals.

Smith & Smith, for appellant.

The quitclaim deed of June 28, 1881, executed by Ernest and Harriet L. Ortman was void and did not operate to release the plaintiffs inchoate right of dower.

1878 G. S. ch. 46, § 3, provides that the surviving wife shall hold in fee simple one equal undivided one third of all lands of which her husband was at any time during coverture seized or possessed, free from any testamentary or other disposition thereof, to which the wife shall not have assented in writing. 1878 G. S. ch. 48, § 13, provides that a married woman may bar her right of dower in any estate conveyed by her husband, or by his guardian if he is a minor, or an insane person, by joining in the deed of conveyance, or by a subsequent deed executed by herself alone.

The deed of Harriet L. Ortman and Ernest Ortman of June 28, 1881, is not within the letter or spirit of either section. Under section 3 to make her release effectual to bind her, her deed or release must expressly consent or assent to the sheriff's deed which divested her husband of his title. That is the plain and manifest meaning of the statute. But the quitclaim deed makes no reference to the sheriff's deed and does not assent in writing to that conveyance. Her deed did not bar her dower under section 3. The words "to which" used in this section refer to the deed which divested her husband's estate, and it is to such conveyance that her assent must be given in writing and by name and proper reference thereto if the statute is to be regarded and followed. Without this reference to such deed there is nothing to show her assent thereto in writing. Under Section 13 supra the conveyance which the wife may make in order to bar dower must relate to lands which were or had been conveyed by her husband or his guardian if he was a minor or insane. This she could do, first, by joining in the original deed with her husband, or second, by a subsequent deed with her husband joining, or by herself alone, but both modes of release by the wife can release dower only in lands conveyed by her husband for it is only to such lands as have been conveyed by the husband or his guardian that this whole section refers. Lands conveyed by the sheriff are not included in this section. *Runnels v. Gerner*, 80 Mo.

474; *Glidden v. Strupler*, 52 Pa. St. 400; *Baxter v. Bodkin*, 25 Ind. 172; *Dodge v. Hollinshead*, 6 Minn. 25; *Marvin v. Smith*, 46 N. Y. 571; *Bressler v. Kent*, 61 Ill. 426.

Dower is not barred or divested by the sale of the husband's lands on execution against him. *Dayton v. Corser*, 51 Minn. 406; *White v. White*, 16 N. J. Law, 202.

When the husband's deed conveys nothing, the joinder of the wife in such deed is a nullity. *Witthaus v. Schack*, 105 N. Y. 332; *Blain v. Harrison*, 11 Ill. 384; *Douglas v. McCoy*, 5 Ohio, 523; *Lowry v. Fisher*, 2 Bush. 70; *Robinson v. Bates*, 3 Met. (Mass.) 40; *Maloney v. Horan*, 53 Barb. 29; *Stinson v. Sumner*, 9 Mass. 143; *Summers v. Babb*, 13 Ill. 483.

The present interest or estate of the wife in her husband's lands is nothing more nor less than an enlarged dower and is governed by all the rules and limitations of the common law and statutory dower. *In re Rausch*, 35 Minn. 291; *In re Gotzian*, 34 Minn. 159; *McGowan v. Baldwin*, 46 Minn. 477; *Dayton v. Corser*, 51 Minn. 406; *Holmes v. Holmes* 54 Minn. 352.

Jonas Guilford, for respondents.

All dower has been abolished by statute and a statutory right enacted in its place, and it is necessary in order to eliminate the right of the wife for her to assent to the conveyance of the husband in writing, but that assent may be general, and by most any method or instrument which shows that fact. It is usually done by joining in the deed of the husband.

COLLINS, J. There is nothing at all in the claim made by plaintiff in this action. It was brought to obtain a partition of certain real property. As the widow of one Earnest Ortman, deceased, she claims to be the owner in fee of an undivided one-third of the premises. We need not go into the facts except to say that in 1881, three years after the property had been sold to defendant Samuel H. Chute, to satisfy an execution issued upon a judgment entered and docketed against said Earnest Ortman, who then owned the lots, and from which sale there has been no redemption, said Earnest

Ortman and this plaintiff, his wife, made, executed, and delivered their deed of conveyance under seal, in which, for an expressed consideration of one dollar, they granted, bargained, sold, and quit-claimed the premises to these defendants. This deed was duly acknowledged by the grantors, and was put upon record. The court found, as facts, although we must not be understood as holding that they were material, that, at the time of the purchase at the execution sale, these defendants were copartners under the firm name of Chute Bros., engaged in the business of buying and selling real property; that said purchase was made for the firm, and the price paid out of firm funds, although the sheriff's certificate was issued to Samuel H.; and also found that the sum of \$100 was the actual consideration for the execution and delivery of the deed referred to.

Although it is asserted by counsel for plaintiff to the contrary, we regard these findings as fully supported by the evidence. We do not feel called upon to discuss the points made in the very full and ingenious brief made by counsel for plaintiff, and really based upon 1878, G. S. ch. 46, § 3, and Id. ch. 48, § 1 (13). It is sufficient to say that 1878 G. S. ch. 40, § 1, provides that conveyances of land, or of any estate or interest therein, may be made by deed executed by any person having authority to convey the same, and duly acknowledged and recorded, while, by the next section, the real estate of the wife may be conveyed by the joint deed of husband and wife. In section 26 of the same chapter it is enacted that the term "conveyance," as used in chapter 40, shall be construed to embrace every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected in law or in equity, except wills, some certain leases, and executory contracts for the sale or purchase of real property. Here Earnest Ortman and his wife, this plaintiff, made, executed, and delivered, under their hands and seals, to these defendants a deed of conveyance whereby, for an actual consideration of \$100, the expressed consideration being nominal, they granted, bargained, sold, and conveyed the premises in dispute to defendants.

The plaintiff is bound by the conveyance for several reasons, and by no amount of ingenious reasoning and refining can it now be demonstrated that she retained an inchoate right to an undivided

third, which ripened into the estate provided for in Laws 1889, ch. 46, § 64, when her husband died, in 1890.

Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 583.)

57 456
571 268

WALTER A. WOOD HARVESTER CO. *vs.* RUFUS C. JEFFERSON *et al.*

Argued May 1, 1894. Reversed June 12, 1894.

No. 8669.

Recovery for stock subscribed—Tender of the stock.

Where, in an action brought to recover the full amount due upon a stock subscription agreement, or a final payment when the amount is to be paid in installments, it is alleged in the complaint that, after signing the agreement, defendant subscribers delivered it to plaintiff corporation, and the latter then and there accepted the subscription, and agreed to deliver the shares subscribed for to the former when paid for, it is also necessary to allege a readiness and willingness on the part of the plaintiff to deliver the stock certificates. *Held*, that the complaint herein stated but one cause of action, although a number of calls made by the board of directors for the payment of installments of the amount subscribed and that defendants refused to pay, were set forth separately and independently, including a call for the final installment due.

Appeal by defendants, Rufus C. Jefferson and James Kasson, from an order of the District Court of Ramsey County, *Wm. Louis Kelly, J.*, made October 7, 1893, overruling their demurrer to the complaint.

The plaintiff, the Walter A. Wood Harvester Company, is a corporation organized in January, 1892, under the laws of this state, with a capital of \$2,500,000 divided into shares of \$100 each. The defendants are partners in business and on January 22, 1892, subscribed for and agreed to take and pay for at par fifty shares of the stock. They signed the stock subscription and paid five per cent. upon their shares. The balance was to be paid in install-

ments as called for by the board of directors, and by the terms of the subscription agreement, they were to receive their stock when paid for. The board made calls payable as follows: July 5, 1892, five per cent; August 5, 1892, five per cent; September 20, 1892, ten per cent; October 20, 1892, ten per cent; November 20, 1892, ten per cent; December 20, 1892, ten per cent; January 20, 1893, ten per cent; February 10, 1893, ten per cent; March 10, 1893, ten per cent; April 10, 1893, five per cent; May 10, 1893, five per cent; and June 10, 1893, five per cent. None of these calls were paid by defendants and this action was brought to recover the \$4,750 remaining unpaid. Each call was set forth in the complaint as a several and separate cause of action. It nowhere stated that the shares of stock had been offered to defendants or that the plaintiff was able, ready or willing to deliver the stock on receiving payment.

The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The court overruled the demurrer and gave defendants leave to answer in twenty days on payment of ten dollars costs, citing *Marson v. Deither*, 49 Minn. 423. Defendants appeal from the order.

Owen Morris, for appellants.

The promise of plaintiff to deliver the stock and the promise of defendants to pay for it were concurrent and dependent, and neither party could require the other to perform without performing or offering to perform the promise on its or their part. As plaintiff has neither issued the stock nor offered to issue or deliver it, the action is prematurely brought. *James v. Cincinnati, H. & D. R. Co.*, 2 Disney 261.

Marson v. Deither, 49 Minn. 427, cited by the lower court is inapplicable, for this court there says, it is also undoubtedly true that parties may contract that the stock shall not be paid for until the certificate therefor has been issued and delivered or tendered. *Clark v. Continental Imp. Co.*, 57 Ind. 135; *Pittsburg & C. R. Co. v. Stewart*, 41 Pa. St. 54; *Chase v. Sycamore & C. R. Co.*, 38 Ill. 215.

Munn, Boyeson & Thygeson, for respondents.

Was a tender of the shares necessary? The case of *Marson v. Deither*, 49 Minn. 423, answers the question in the negative. The fact that plaintiff alleges in its complaint that it agreed to deliver the said shares so subscribed for by defendants to them when paid for, does not render the case of *Marson v. Deither* inapplicable. From the language of the allegation it appears that the shares were not to be delivered until they had been paid for. Payment of the subscription was to precede the delivery of the shares subscribed for. *Walter A. Wood Harvester Co. v. Robbins*, 56 Minn. 48.

COLLINS, J. This was an action brought upon the stock subscription under consideration in the same plaintiff against *Robbins*, 56 Minn. 48, (57 N. W. 317;) the main difference being that the attempted recovery here was for the entire amount subscribed, less five per cent. paid on the first call, instead of for a single installment. We need not discuss all of the points made upon the appeal, which is from an order overruling a general demurrer to an amended complaint.

There is one allegation in this complaint which was not found in that considered in the *Robbins Case*, namely that, after signing said agreement, the defendants delivered the same to plaintiff, and plaintiff then and there accepted said subscription agreement, and agreed to deliver said shares so subscribed for by defendants to them when paid for. It is contended that by this allegation the transaction set forth in the complaint was a purchase of the stock shares, as distinguished from a subscription for shares, and that the complaint is therefore defective and insufficient, because there is no allegation that plaintiff has tendered the shares, and none that it is able and willing so to do.

In *Columbia Electric Co. v. Dixon*, 46 Minn. 463, (49 N. W. 244,) the rule was laid down that it was no defense to an action on a subscription for stock shares to allege in the answer that the corporation had not delivered or tendered the certificate to which the subscriber was entitled. Citing that case, and also referring to the

earlier one of *St. Paul S. & T. F. R. Co. v. Robbins*, 23 Minn. 439, which at first impression seemed to be at variance, it was held in *Marson v. Deither*, 49 Minn. 427, (52 N. W. 38,) which was brought by an assignee in insolvency to recover forty per cent. of an amount subscribed for stock shares, that it was not necessary to allege a tender of the stock certificate in the complaint. The court below, when making its order, as well as counsel for plaintiff in the argument, relied upon the last-mentioned case as governing the one at bar on this particular point. We do not think so. The transaction, as alleged in the complaint now before us, was unlike that set out and considered in the *Marson* Case. It is expressly averred here that upon the delivery of the subscription agreement by defendants, and its acceptance by plaintiff, the latter agreed to deliver the stock shares subscribed, to the former when paid for; and the action is brought, not for a single installment of the amount subscribed, but for all that can become due in any event,—for the final installment among others. Under the language used in the agreement it seems plain that the delivery of the shares by plaintiff, and payment of the final installment by defendants, were intended to be concurrent acts, one dependent on the other. In this respect the transaction is easily to be distinguished from that considered in *Marson v. Deither*.

It is claimed by defendants' counsel that the complaint is defective, not only because it does not contain an averment of readiness and willingness to issue and deliver the stock shares, but because it fails to allege a tender thereof. A reasonable construction, it is said, must be put upon, and some effect attributed to, the language of the agreement, which was that plaintiff was "to deliver the said shares so subscribed for by defendants to them when paid for." We think that this language cannot be ignored, for under it the right to enforce full payment cannot be regarded as distinct and independent from the ability and willingness to deliver the shares. The acts must be regarded as contemporaneous. The defendants were to pay and the plaintiff was to deliver at the same time. If the latter is not in position to comply with its part of the contract, there should be no enforcement as against the former. And we think that there should, at least, have been an allegation in the complaint that plaintiff was ready and willing to deliver the certificates of stock. An

action to enforce payment of stock subscriptions may be maintained, it is said, without a previous tender of stock certificates, and this is true even though the contract may provide for their issue upon payment. A readiness and willingness, however, to deliver the certificates must be alleged in the complaint in actions for the whole amount subscribed, or to enforce payment of the final installment of the amount subscribed. *James v. Cincinnati H. & D. R. Co.*, 2 Disney, 261; *Clark v. Continental Imp. Co.*, 57 Ind. 135; 2 Beach, Priv. Corp. § 574; *Cook, Stock & Stockh.* § 192. It is true that plaintiff's counsel have set forth its cause of action in the complaint, which, as before stated, was for the entire amount of the subscription, less five per cent. paid on the first call made by the board of directors, as if it actually consisted of several causes of action. The subscription called for payment in installments as the board of directors might require and direct by resolution, and, in the complaint, each of these calls is set out, with other essential allegations, by itself, as fully as if the action had been brought for a single installment. But the fact that, as to each of these installments, the allegations are complete and sufficient, will not prevail as against a general demurrer, for the complaint must be taken as stating a single cause of action, namely, the recovery of the balance of the subscription remaining due and unpaid. The plaintiff would not have been permitted, when it brought this action, after the last call or assessment was made, to split its cause of action, and to bring separate actions for each installment. Hence, the complaint really contained but one cause of action, and is to be so treated.

As to the other alleged defects, we think the pleading is not open to the charge that it failed to state a cause of action. Order reversed.

The CHIEF JUSTICE, absent, serving as a member of the state board of regents, and BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 532.)

GEORGE ROTHENBERGER vs. NORTHWESTERN CONSOLIDATED MILLING Co.

57	461
64	26
64	27

Submitted on briefs May 9, 1894. Affirmed June 12, 1894.

No. 8640.

Servant injured by defective machinery after notice of defect given master.

When a servant who has knowledge of defects in the instrumentalities furnished for his use, or in machinery about which he is employed, is induced to remain in the service by reason of a promise made by the master that the defects shall be repaired or remedied,—the instrumentality or machinery not being so imminently and immediately dangerous that a man of ordinary prudence would have refused to longer use or work about it,—the servant may recover for an injury caused thereby within such a period of time after the promise as would be reasonably allowed for its performance, or within any period which would not preclude all reasonable expectation that the promise might be kept.

A reasonable time in which to repair is a question of fact for the jury.

Held, in the case at bar, that, upon the evidence, it was for the jury to determine whether a reasonable time had elapsed after the alleged promise, and before plaintiff suffered the injury.

Notice to master of the defect—sufficiency of the statement.

When complaining of defective instrumentalities or machinery to the master, it is not necessary that the servant shall state in exact words that he apprehends danger to himself by reason of the defects, nor need there be a formal notification that he will leave the service unless the defects be repaired or remedied. It is sufficient if, from the circumstances and the conversation, it can be fairly inferred that the servant is complaining on his own account, and that he was induced to continue in the service by reason of the promise.

Appeal by defendant, the Northwestern Consolidated Milling Company, a corporation, from an order of the District Court of Hennepin County, *Thomas Canty, J.*, made December 2, 1893, denying its motion for a new trial.

The plaintiff, George Rothenberger, was employed to dust the machines and sweep one of the floors in defendant's flouring mill at Minneapolis. He commenced work in January, 1892. On this

floor defendant operated a large number of machines known as centrifugal reels enclosed in wooden casings. As a part of each machine there was a shaft projecting through the casing and on it outside was a wheel with cogs fitting into another cog wheel turning with great velocity. These outside wheels were not covered or guarded and plaintiff in April spoke to the foreman about them and the danger, and he promised to cover them, and plaintiff relied on the promise. They were not covered however and on May 6, 1892, the fingers on plaintiff's right hand were caught between these two cog wheels on one of the machines and injured so that three of them were amputated. He brought this action and had a verdict for \$500. Defendant moved for a new trial. Being denied it appeals.

Keith, Evans, Thompson & Fairchild, for appellant.

Omitting to fence or guard gearing of this kind is not negligence. The leading case establishing this doctrine is that of *Sullivan v. India Mfg. Co.*, 113 Mass. 396. *Sanborn v. Atchison, T. & S. F. R. Co.*, 35 Kan. 292; *Schroeder v. Michigan Car Co.*, 56 Mich. 132; *Townsend v. Langles*, 41 Fed. Rep. 919; *Craver v. Christian*, 36 Minn. 413; *Barbo v. Bassett*, 85 Minn. 485; *Carroll v. Williston*, 44 Minn. 287.

These cases also hold that the plaintiff in such case voluntarily assumes the risk incident to the employment and, having done so, cannot recover. *Bergen v. St. Paul, M. & M. Ry. Co.*, 39 Minn. 78.

The plaintiff did not bring himself within the exception to the rule by the talk he says he had with the foreman Krum; and, if it should be held that he did, then his own testimony shows conclusively that he waited for more than a reasonable time between the conversation and the accident, for the repairs to be made, and hence must be held to have again assumed the risk. *Lewis v. New York & N. E. R. Co.*, 153 Mass. 73; *Stephenson v. Duncan*, 73 Wis. 404.

Rea, Hubachek & Healy, for respondent.

If plaintiff gave notice of the defect in the machinery and the master promised to remedy it and plaintiff thereupon continued at

work a reasonable time and was injured, he can recover because the law implies a contract upon the part of the employer, that if the servant continues in the employ in the meantime and until the defects are remedied, the employer and not the servant will assume the risks. *Greene v. Minneapolis & St. L. Ry. Co.*, 31 Minn. 248; *Lyberg v. Northern Pac. Ry. Co.*, 39 Minn. 15.

COLLINS, J. It is well settled in this state, as it is elsewhere, that if a servant who has knowledge of defects in the instrumentalities furnished for his use, or in machinery about which he is employed, gives notice thereof to the master, who thereupon promises that the defects shall be remedied, the servant may recover for an injury caused thereby, at least where the master requested or induced the servant to continue in the service, and the injury occurred within the time at which the defects were promised to be remedied, and where the instrumentality or machinery was not so imminently and immediately dangerous that a man of ordinary prudence would have refused longer to use or work about it. Under such circumstances the risk attendant upon the use of instrumentalities or machinery known by the servant to be dangerously defective is shifted upon the master, he assuming the risk previously borne by the servant.

But it is urged in behalf of defendant that, upon the proofs adduced on the trial of this case, plaintiff utterly failed to bring himself within the rule as to the assumption of risk by the master. It is true that plaintiff, when complaining of the gearing into which his hand was afterwards drawn, did not notify defendant's head millwright or foreman that, unless coverings were put upon the exposed and dangerous parts, he should quit defendant's employ, nor did he say, in so many words, that he apprehended danger to himself, but positive assertions and statements of this character are not absolutely necessary. According to the best-considered cases, the real question to be determined is whether, under all the circumstances, as they appear in each case, the master had a right to believe, and did believe, that the servant intended to waive his objection to the defect of which he has complained. This is a question of fact, not of law, and consequently for the jury, at least if not entirely free from doubt.

There can be no question that, when a master has expressly promised to repair or remedy a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as would be reasonably allowed for its performance, or within any period which would not preclude all reasonable expectation that the promise might be kept. *Hough v. Railway Co.*, 100 U. S. 213; 1 Shear. & R. Neg. § 215, and cases cited. It is clear from the evidence that plaintiff referred to the danger apprehended by himself when he complained of the exposed parts of the gearing, and requested that they should be covered. So far as we are informed by the record, no other workman or person was liable to an injury from this defect. He had been put at work sweeping and dusting about the machines, and this work frequently brought him in close contact with the machinery about which the conversation was had. The millwright or foreman to whom the complaint was made, if made at all, must have understood that plaintiff had his own welfare and safety in mind, and not that of other people. In this respect the case is vastly different from that of *Lewis v. New-York & N. E. R. Co.*, 153 Mass. 73, (26 N. E. 431,) relied upon by counsel. The testimony in that case compelled the court to believe that plaintiff, Lewis, acted in the interest of the defendant corporation, and not with reference to his own safety, when he notified the superintendent of the rotten condition of the flooring of the bridge pier, which pier was open to, and liable to be visited by, strangers. Certainly, in the case at bar, it was for the jury to determine from the evidence whether the plaintiff made complaint in his own behalf, and for his own protection; and the conclusion is almost irresistible that he did, and that the millwright must have so understood it. And from the circumstances under which the complaint was made, and the conversation which ensued between plaintiff and the millwright, it was for the jury to say whether the former remained at work because of the alleged promise to box the gearing,—was induced to stay because it was stated that the defect should be remedied. It could fairly be inferred from what was said and done that he was induced to remain because of the promise.

The plaintiff testified that the promise was made a week or ten days prior to the accident. He also admitted that there had been

plenty of time within which the boxes or coverings could have been made, and put in place, before he was injured. In fact, he conceded that the work could have been done in two days, with all of the millwright force available for the purpose. But we do not think that it could have been expected that all of the millwrights in defendant's employ should be put at this work immediately upon the making of the promise, or that all other work of that character about the mill, which was a very large one, should have been promptly suspended, that the gearing might be covered at once. The question of whether the injury had been received within a reasonable period of time after the promise was said to have been made, or whether it had been suffered within a period which would not preclude all reasonable expectation that the promise might be kept, was clearly submitted to the jury; and obviously the testimony on this was such that we would not be justified in saying, as a matter of law, that a reasonable time had elapsed and expired, and that, therefore, plaintiff had waived his objection, and again assumed the risk. See *Lyberg v. Northern Pacific R. Co.*, 39 Minn. 15, (38 N. W. 632.) Order affirmed.

BUCK, J., absent, sick, and CANTY, J., who, as district judge, tried the cause below, did not sit.

(Opinion published 59 N. W. 581.)

AMANDA GATES vs. JAMES H. EGE, Sheriff, et al.

Argued May 10, 1894. Affirmed June 12, 1894.

No. 8702.

Redemption from foreclosure sale by a grantee of the mortgagor.

In an action brought by plaintiff, as the owner of certain real estate, to redeem from a sale made upon the foreclosure of a mortgage, which was a first lien upon the premises, and also from a decree afterwards made in proceedings to enforce a mechanic's lien, it is *held* that, as it clearly appeared that plaintiff had permitted the year within which she

v.57m.—30

had the statutory right to redeem from the mortgage foreclosure sale to expire without redeeming, the complaint failed to state a cause of action.

Appeal by plaintiff, Amanda Gates, from an order of the District Court of Hennepin County, *Robert D. Russell, J.*, made November 20, 1893, sustaining a demurrer to her complaint.

The defendants, James H. Ege, as Sheriff of Hennepin County, the Northwestern Mutual Life Insurance Company, the Chadbourn Finance Company and Daniel Fish, demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. It stated among other facts that Jerome F. Tubbs owned lot twelve (12) in block ten (10) in Penniman's Addition to Minneapolis and on March 13, 1890, he and wife mortgaged it to Mary A. Topliff for \$13,000 and on August 5, 1890, gave her a second mortgage thereon for \$10,000. On April 6, 1891, Tubbs and wife deeded the lot to Rushton M. Dorman and he on July 5, 1893, deeded to plaintiff. Meantime, Mrs. Topliff foreclosed her second mortgage under a power of sale therein and bid in the property August 10, 1891, for \$11,140.59. She also foreclosed her first mortgage under a power of sale in it and bid in the property September 7, 1891, for the amount due thereon with attorney's fees and disbursements. Parties having mechanic's liens on the premises commenced proceedings to foreclose them. These proceedings are stated in the opinion and in *Wentworth v. Tubbs*, 53 Minn. 338. On April 30, 1892, judgment was entered adjudging Topliff's first mortgage to be prior to all other liens. A part of Topliff's second mortgage and some of the mechanic's liens were declared coordinate and placed in a second class. The balance of Topliff's second mortgage and others of the mechanic's liens were placed in a third class. The remainder of the mechanic's liens and the liens of general judgment creditors were made fourth and fifth classes respectively, and a sale was ordered to satisfy the claims of the parties, such sale however to be made subject to the lien of the first mortgage and also to the right of Tubbs or his assigns to redeem within one year from the date of the confirmation of the sale under the judgment. Subsequently, an execution was issued thereunder and on August 30, 1892, a sale was duly made to satisfy said judgment at which Wheaton & Reynolds became the purchasers of the equity of redemption from

the first mortgage, paying therefor \$150, and on September 3, 1892, this sale was duly confirmed by the court. On September 7, 1892, Wheaton & Reynolds by reason of such purchase having become creditors with a right to redeem from said first mortgage sale, filed their notice of intention to redeem therefrom and did within the five days allowed by statute redeem said premises, receiving the sheriff's certificate of redemption as creditors by reason of their being purchasers at the judgment sale.

On August 31, 1893, the plaintiff presented to the sheriff the deed to Dorman and his deed to her, and tendered to him \$19,066.39 and claimed the right to redeem from the sale on foreclosure of the mechanic's liens. The sheriff refused to take the money and declined to give a certificate of redemption on the ground that plaintiff being a grantee of the land could only redeem within twelve months from the day of sale on foreclosure of the first mortgage, that no proceedings or judgment in the action to foreclose the mechanic's liens had enlarged the plaintiff's right of redemption. She thereupon brought the money into court and commenced this action to redeem. The defendants demurred. The court sustained the demurrer and she appeals.

Merrick & Merrick and Welch & Welch, for appellant.

The redemption of Wheaton & Reynolds from the first mortgage foreclosure sale on September 12, 1892, was but a payment of the first mortgage and merged the first mortgage in their right as purchasers at the judgment sale. Wheaton & Reynolds being without right to redeem from the foreclosure at the first mortgage sale, were compelled to redeem as such purchasers and the amount expended by them in such redemption became tacked to the amount paid by them at the judgment sale.

The redemption by Wheaton & Reynolds from the sale under the first mortgage will be regarded as a payment, and the title obtained thereunder will be merged in the title of the purchaser at the judgment sale and will pass to the plaintiff who has the legal right to redeem from that sale. This is the legal effect of their act because, having no legal rights as redemptioners they can claim no legal rights against plaintiff for the payment of the first mortgage, they

having paid the same voluntarily and for the purpose of defrauding appellant of her property. Any title they may claim to have obtained against the plaintiff by redemption of the first mortgage merged in the title obtained under the judgment sale. *Bunch v. Grave*, 111 Ind. 351; *Johnson v. Zink*, 51 N. Y. 333; *Montgomery v. Vickery*, 110 Ind. 211; *Mines v. Moore*, 41 Ill. 273; *Weiner v. Heintz*, 17 Ill. 259; *Robbins v. Swain*, 68 Ill. 197; *Russell v. Allen*, 10 Paige 249; *Tice v. Annin*, 2 John. Ch. 125; *Vanderkemp v. Shelton*, 11 Paige 26.

James O. Pierce, H. D. Dickinson, and Lawler, Durment & Bigelow, for respondents.

It appears distinctly by the complaint that long before the bringing of this suit all the right, title and interest of Tubbs, the former owner and of his vendees in or to the property had been completely divested. The sale under the foreclosure of the senior mortgage was made September 7, 1891. On September 7, 1892, no owner's redemption having been made, the title passed absolutely to the purchaser at the sale as against Tubbs and his vendees. This fact completely cuts off the present plaintiff, no matter who afterwards acquired the title. The acquisition of that title by the purchaser at that sale, was of course subject to the right of creditors to redeem, but that right could not in any manner inure to the benefit of the present plaintiff. *Pamperin v. Scanlan*, 28 Minn. 345; *Jacoby v. Crowe*, 36 Minn. 97; *Sprague v. Martin*, 29 Minn. 226; *Martin v. Fridley*, 23 Minn. 13; *Guileries v. Brunelle*, 37 Minn. 71; *Abraham v. Holloway*, 41 Minn. 156.

The attempt is made in appellant's brief to put Wheaton & Reynolds in the position of having paid off the first mortgage. But this is to be done, first, against the will of Wheaton & Reynolds and without making them parties to the suit; and, second, in the face of their expressed intention to do otherwise.

COLLINS, J. Although a great number of facts are set forth in the complaint herein, to which a general demurrer was interposed and sustained, the few which are important and controlling are as follows: April 6, 1891, the premises in controversy were owned by

one Tubbs. They were then subject to a first mortgage of date March 13, 1890, and a second of date August 5, 1890, in both of which one Topliff was the mortgagee; and were also subject to certain mechanics' liens. August 10, 1891, the second mortgage was foreclosed by a sale under a power therein contained, the mortgagee, Topliff, becoming the purchaser. September 7th of the same year the first mortgage was foreclosed by a sale under a like power, the same person, Topliff, becoming the purchaser. July 8, 1891, an action was commenced by the proper parties against Tubbs and others: to foreclose one of said mechanics' liens. This action was consolidated with others of the same nature, so that prior to the entry of judgment a large number of parties, including the mortgagee and purchaser at the foreclosure sales, Topliff, were made defendants under the statute. April 30, 1892, a decree was duly entered in that action, adjudging that the first mortgage was paramount and superior to all other claims and liens, and that the second mortgage was co-ordinate and equal to certain of the mechanics' liens; and further adjudging that the premises should be sold by the sheriff pursuant to law, and that Tubbs, or any one claiming under him, should have one year from the confirmation of the sheriff's sale to redeem therefrom. August 30, 1892, the sale was had, one Wheaton and one Reynolds purchasing the property thereat, free and clear of all liens and incumbrances except the lien of the first mortgage. This sale was confirmed by the court September 3, 1892, and the proper certificate of sale issued by the sheriff and delivered to the purchasers. September 7th Wheaton and Reynolds caused to be filed in the office of the register of deeds for the county in which the premises were situated a notice of their intention to redeem from the foreclosure sale made under the power contained in the first mortgage, claiming the right to make such redemption as purchasers at the sheriff's sale of August 30, 1892. September 12th they made redemption as by law provided, receiving from the sheriff the prescribed certificate of redemption. The certificates, issued to the purchasers at the mortgage foreclosure sales, and at the sale under the lien foreclosure proceedings, and that issued when redemption was made, were duly recorded. It may be said, in passing, that redemption was made from Wheaton and Reynolds by one of the judgment creditors in the mechanic's lien action, and from him by a party who claimed to have the

right so to do as a mortgagee of Topliff's interest after the owner's right to redeem from the sale in foreclosure of the second mortgage had expired.

On the day first mentioned herein—April 6, 1891—Tubbs conveyed the premises by deed to one Dorman, and on July 5, 1893, the latter conveyed the same to this plaintiff. Both deeds were recorded August 31, 1893, and on the same day plaintiff tendered to defendant Ege, as sheriff, the amount paid by Wheaton and Reynolds at the lien foreclosure sale, with interest, the amount paid by them in redemption from the sale in foreclosure of the first mortgage, with interest, and "out of excess of caution," as counsel puts it, an additional sum, to cover, with interest, amounts which had been paid and were due to other pretended redemptioners, before referred to, and demanded that there be executed and delivered to her a certificate of redemption of said premises in due form, free and clear from all claims had or held thereto by the party who had taken a mortgage from Topliff, and had then redeemed from Wheaton and Reynolds, namely, the defendant Chadbourn Finance Company, and free and clear from all claims had or held by its mortgagee, defendant insurance company. The sheriff refused to accept the tender or to execute and deliver the certificate of redemption, and this action is the result of such refusal.

With this statement of dominant facts, very little need be said in disposing of the appeal. The period within which the owner of real property may redeem from mortgage foreclosure sales made under a power is fixed by 1878, G. S. ch. 81, §§ 13, 14, at one year from the day of sale; and at the expiration of the year, no redemption being made, the certificate of sale operates as a conveyance to the purchaser or his assigns of all the right, title, and interest of the mortgagor in the premises at the date of the mortgage. It has often been stated in the decisions of this court that the estate of the mortgagor, and of all persons claiming under him, is extinguished by a foreclosure of the mortgage and a failure to redeem; that the interest acquired by a mortgagee who purchases at a foreclosure sale ripens into an absolute title at the end of the year, if there is no redemption; that the right given to creditors having a lien, legal or equitable, to redeem, begins after the title of the purchaser at the sale has become perfect and absolute as against the mortgagor or

his successors in interest; and that redemption by a creditor does not annul a sale, but appropriates the benefit of it to the redemptioner.

We need not discuss the effect of the owner's failure to redeem from the foreclosure of the second mortgage—the first foreclosure in point of time—within the year of redemption, which ended August 10, 1892, 20 days before the sale to Wheaton and Reynolds, for it does not seem important. There had been—September 7, 1891—a sale under a foreclosure of the first mortgage, which antedated and was prior and paramount to all other liens, at which sale the mortgagee, Topliff, was the purchaser, and duly received and recorded a certificate thereof. The year within which the owner of the premises could exercise the statutory right of redemption from the sale expired September 7, 1892, eight days after the sale to Wheaton and Reynolds, and but four days after the sale to them was confirmed by the court. The owner made no redemption from this mortgage foreclosure sale, so that, under the statute and the decisions referred to, whatever estate the mortgagor or any person claiming under him had in the mortgaged premises was wiped out and extinguished at the end of the year, even if it had not been when there was a failure to redeem from the earlier sale under the second mortgage. The interest acquired by the mortgagee as a purchaser at the foreclosure sale ripened into an absolute title as against Dorman, who then held a deed of conveyance from Tubbs, the mortgagor, when the year had elapsed without redemption. It was then that the right of creditors, legal or equitable, to redeem began; and, by redemption under the statute, the right of Dorman to redeem as owner, already extinguished, could not be revived.

We need not attempt to point out wherein the cases cited by plaintiff's counsel fail to establish their position that Dorman's right to redeem was in some manner revived by the redemption made September 12th by Wheaton and Reynolds. They either involve general equitable principles where there was no statute to govern, or are decisions upon statutes entirely unlike ours. Evidently none are in point here, unless we could in some manner, and in the face of undisputed facts, as well as the provisions of the statute, declare that Dorman's rights were not extinguished at the end of the year of redemption, and that the redemption by Wheaton and Reynolds

amounted to nothing more than the discharge of an incumbrance by payment of it by the persons holding the legal title.

Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 495.)

EDWIN C. WHITNEY *vs.* NATIONAL MASONIC ACCIDENT ASS'N.

Submitted on briefs May 2, 1894. Affirmed June 12, 1894.

No. 8796.

Insurance solicitor is the agent of the insurer in the representations he makes to the insured.

The rule laid down in *Kausal v. Minnesota Farmers M. F. Ins. Ass'n*, 31 Minn. 17, that agents of an insurance company authorized to procure applications for insurance, and to forward them to the company for acceptance, must be deemed the agents of the insurers in all that they do in preparing the application, or in any representations they may make as to the character or effect of the statements therein contained, *held* to apply in the case of a mutual benefit association organized for the purpose of indemnifying its members on account of accidents occurring to them, the necessary money being raised solely by assessments upon said members.

The evidence, what it shows.

Held, further, that there is nothing in the evidence herein tending to indicate that the plaintiff, who, while a member, met with an accident, participated in the alleged misstatements contained in the application made out by the agent, or had any knowledge of them. *Held*, further, that from the evidence it clearly appeared that the person who solicited plaintiff to become a member, and filled out a blank application for membership, was the agent of defendant association, for whose misstatements therein it, and not plaintiff, was responsible.

On Rehearing.

Question not raised below will not be considered here.

The question of a departure in the reply from the cause of action set out in the complaint, not having been properly raised in the trial court, will not be considered on appeal.

Appeal by defendant the National Masonic Accident Association of Des Moines, Iowa, from an order of the District Court of Hennepin County, *Henry G. Hicks, J.*, made September 22, 1893, denying its motion for a new trial.

The plaintiff, Edwin C. Whitney, was insured June 2, 1890, by defendant. He was fifty six years old and was treasurer of the Mississippi & Rum River Boom Company and engaged in official duties in its offices in Lumber Exchange Building, Minneapolis, and in travelling for it. By the policy it agreed to pay him \$25 per week for a period not exceeding fifty two consecutive weeks in case he should be incapacitated for business by external, violent and accidental means. But the indemnity was not to exceed the sum realized by an assessment of two dollars upon each of the members at the date of the accident. Plaintiff's foot was frozen fifteen years before while out on snow shoes in the northern part of the state and his little toe and the one adjoining on his left foot were amputated together with about an inch of the bone back of the little toe. From this time there was on the outer or left side of that foot a lack of sensibility. It was less sensitive to heat and cold.

L. E. Crane, defendant's agent, came to plaintiff's office about June 1st, 1890, and asked him to take an accident policy. He read to plaintiff the application for membership and plaintiff answered all the questions he asked, made to him a full statement of the condition of his left foot, that there was numbness about it, and the cause of its condition and how it occurred. Crane said that it was of no consequence. He filled up the blank application and the plaintiff signed it. It contained this statement, "I have never had nor am I subject to fits, disorders of the brain or any bodily or mental infirmity except as herein stated." There was no statement in the application regarding his foot and plaintiff knew there was not.

This application was forwarded to the home office and the defendant made and forwarded to the plaintiff the certificate sued on. One of its terms provides, "This insurance does not cover disappearances nor injuries of which there is no visible mark upon the body; nor accident, or disability resulting wholly or in part, di-

rectly or indirectly, from any of the following causes, or while so engaged or affected: disease or bodily infirmities."

On January 28, 1891, plaintiff was riding north on the St. Paul and Duluth Railroad from Minneapolis to North Pacific Junction. He sat next the window of the car playing cards. The weather was cold and the steam heating pipes under the seat were hot. The outer or left side of his left foot came in contact with the steam pipes and was seriously burned before plaintiff was aware of the injury he was receiving. He was thereby incapacitated for business for seventeen weeks and four days. He made and served proofs of his injury and loss. The claim was disputed and he appointed an arbitrator and the defendant appointed another, but the two were unable to agree upon a third and the arbitration failed. Plaintiff then brought this action. At the first trial the court dismissed the action, but on appeal the judgment was reversed. *Whitney v. National Masonic A. Ass'n*, 52 Minn. 378. At the second trial plaintiff obtained a verdict for \$485.53. Defendant moved to set it aside and for a new trial. Being denied it appeals.

Clark Varnum, and F. A. Gilman, for appellant.

It must be assumed from the record that plaintiff, at the time of his application and of the issuance of the certificate, had a bodily infirmity within the terms of the policy. He cannot recover unless he can avoid the provisions of the contract of insurance, as stated in the certificate or policy. He seeks to avoid the restriction in the policy by showing that he told Crane at the time of making the application all the facts in the matter as to his infirmity. He offered no proof as to the agency of Crane, by virtue of which alone such evidence would be competent. *Gude v. Exchange Fire Ins. Co.*, 53 Minn. 220; *Quinlan v. Providence W. Ins. Co.*, 133 N. Y. 356. There is a total failure to show any agency of the man Crane, and for this reason alone the court should have granted a nonsuit. The plaintiff knew that Crane refused to write any statement of plaintiff's then true condition in the application; knew that Crane had no right to issue policies; knew that the application must be forwarded to the defendant for approval by its secretary and the issuing of the certificate; and knew that the certificate must

be issued upon the statements contained in the application. He knew, what the association did not know, that he had a bodily infirmity and was not an insurable risk. *Johnson v. Dakota F. & M. Ins. Co.*, 1 N. Dak. 167; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519; *Smith v. Insurance Co.*, 24 Pa. St. 320; *State Mut. Fire Ins. Co. v. Arthur*, 30 Pa. St. 315; *Bartholomew v. Merchants Ins. Co.*, 25 Ia. 507; *Ryan v. World Mut. Life Ins. Co.*, 41 Conn. 168; *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274.

The point decided in *Kausal v. Minnesota Farmer's M. F. Ins. Ass'n*, 31 Minn. 17, was that parol testimony that an applicant for insurance stated the facts correctly to the agent taking his application, but that the latter without the knowledge of the insured misstated them in filling out the application, is admissible. *Alabama Gold Life Ins. Co. v. Garner*, 77 Ala. 210; *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274; *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331; *Key v. Des Moines Ins. Co.*, 77 Ia. 174.

Where an agent perpetrates a fraud on the assured by falsely filling up the application after it is signed, the assured is allowed to recover, because he is the party defrauded and has been induced to sign a paper in blank and it has been falsely written or forged over his signature. Nothing of that kind obtains in this case. If there was any fraud perpetrated at all, it was the fraud of the plaintiff himself in signing a statement fully written out and completed which he knew, or if he did not know was bound to know was untrue. It is conceded and not disputed that the statement in the plaintiff's application that he had no bodily infirmity is false, and the plaintiff's evidence conclusively shows that this application containing this statement was fully completed ready for his signature when he signed it.

The statement being untrue in point of fact it avoids the certificate, whether such untruth originated in fraud or mere negligence or want of recollection. If plaintiff did not read the application it was a gross want of care and was negligence in the highest degree, and plaintiff can claim no benefit on account of it. *Quincy v. Shearer*, 56 Minn. 534; *State Mut. F. Ins. Co. v. Arthur*, 30 Pa. St. 315; *Vose v. Eagle L. & H. Ins. Co.*, 6 Cush. 42; *Wilson v. Conway Fire Ins. Co.*, 4 R. I. 141.

A. B. Jackson, and J. B. Atwater, for respondent.

There was sufficient evidence of Crane's agency. *Abraham v. North German Ins. Co.*, 40 Fed. Rep. 717; *Rochford Ins. Co. v. Boirum*, 40 Ill. App. 129; *Hahn v. Guardian Assurance Co.*, 23 Oregon 576; *Gosch v. State Mut. Fire Ins. Ass'n*, 44 Ill. App. 263; *Capital City Ins. Co. v. Caldwell*, 95 Ala. 77; *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285.

An authorized solicitor for insurance is the agent of the insurance company and not of the assured. The policy is not vitiated in the absence of fraud on the part of the assured by incorrect statements in the application, whatever may be the provision of the policy making the application a part of it, or statements of the assured warranties, if the actual facts regarding the incorrect statement were correctly stated to the solicitor, or even if he in the absence of such statement had actual knowledge of such facts. *Follette v. Mutual Acc. Ass'n*, 110 N. C. 377; *Dupree v. Virginia Home Ins. Co.*, 93 N. C. 237; *Hornthal v. Western Ins. Co.*, 88 N. C. 71; *Jamison v. State Ins. Co.*, 85 Ia. 229; *Key v. Des Moines Ins. Co.*, 77 Ia. 174; *Donnelly v. Cedar Rapids Ins. Co.*, 70 Ia. 693; *Jordan v. State Ins. Co.*, 64 Ia. 216; *Insurance Co. v. Williams*, 39 Ohio St. 584; *Union Ins. Co. v. McGookey*, 33 Ohio St. 555; *Deitz v. Providence W. Ins. Co.*, 31 W. Va. 851; *Tarbell v. Vermont Mut. Fire Ins. Co.*, 63 Vt. 53; *Ring v. Windsor Co. Mutual F. Ins. Co.*, 51 Vt. 563; *Continental Ins. Co. v. Pearce*, 39 Kan. 396; *Phoenix Ins. Co. v. Weeks*, 45 Kan. 751; *Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Insurance Co. v. Mahone*, 21 Wall. 152; *New Jersey Mut. Life Ins. Co. v. Baker*, 94 U. S. 610; *Menk v. Home Ins. Co.*, 76 Cal. 50; *Crouse v. Hartford F. Ins. Co.*, 79 Mich. 249; *Temminck v. Metropolitan Life Ins. Co.*, 72 Mich. 388; *Renier v. Dwelling House Ins. Co.*, 74 Wis. 89; *O'Brien v. Home Ben. Soc.*, 117 N. Y. 310; *Miller v. Phoenix Mut. Life Ins. Co.*, 107 N. Y. 292; *Andes Ins. Co. v. Fish*, 71 Ill. 620.

The true distinction between *Kausal v. Minnesota F. M. F. Ins. Ass'n*, 31 Minn. 17, and those cases which hold a different doctrine is in the different views of the courts as to the authority of the soliciting agent. Cases could be cited from Missouri, Maine, Texas,

Connecticut, New Jersey, Pennsylvania, New York and perhaps from a few other states which hold a different doctrine from the *Kausal Case* and those above cited; but all these courts hold that the insurance company can by proper clauses in the application or in the policy limit the authority of the soliciting agent so that his acts in filling out the application are not binding on or imputable to the insurance company. But this doctrine is distinctly repudiated in the *Kausal Case* and is not the law of this state. And where this doctrine does not prevail it seems clear on logical principles that the general rule which we have above stated must hold good. For while it is true that in a certain sense the assured is bound to know the contents of the application which he signs, yet his negligence in this respect is outweighed by the paramount duty of the insurance company not to mislead him or induce this negligence by any act on its part or that of its agent.

The force of this distinction will be observed by comparing *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, with *Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304. Upon facts which were in all essential respects identical, the court held in the first case that the assured could not recover because the insurance company was not bound by the acts of its solicitor; and in the second case it held that he could recover because the insurance company was bound by those acts.

The decisions cited by defendant are not binding as precedents in this state because made by courts which differ from the *Kausal Case* in regard to the limits upon the authority of a soliciting agent.

The fact that plaintiff received and accepted the policy with a copy of the application on the back of it imposed no new liability on him requiring him to examine the application and to see that any mistakes are corrected. The point is directly passed upon in *Donnelly v. Cedar Rapids Ins. Co.*, 70 Ia. 693; *Renier v. Dwelling House Ins. Co.*, 74 Wis. 89.

COLLINS, J. The defendant is a mutual benefit association organized under the laws of the state of Iowa for the purpose of indemnifying its members by payments in money on account of accidents occurring to them, the necessary money being raised solely

by assessments upon the members. This plaintiff became a member in June, 1890, and brought this action to recover the stipulated weekly indemnity for seventeen weeks and four days, because of an accident which befell him in January, 1891. The case has been here before. 52 Minn. 378, (54 N. W. 184.)

The association, at the second trial, resisted payment solely upon the ground of an alleged fraud committed by plaintiff when making application for membership. This application was made out and taken by one Crane, said to be defendant's agent, and contained the following statement or warranty: "10. I have never had * * * any bodily or mental infirmity;" and in the certificate of membership forwarded to plaintiff in due season after the association received the application was the following condition: "This insurance does not cover * * * nor accident, nor death or disability resulting wholly or in part, directly or indirectly, from any of the following causes, or while so engaged or effected: suicide, * * * disease or bodily infirmities."

It was claimed and conceded that, many years before making the application, plaintiff had so frozen one of his feet that two of his toes and part of the bone back of the little toe had been removed. The result was a numbness in that member, and through this numbness the accident on which plaintiff relied as a cause of action resulted. For the purposes of this discussion it must be taken for granted that the accident in question would not have occurred had there been no previous injury to the foot, and, further, that, within the terms and conditions of the application and certificate, the injury, with its result, amounted to a bodily infirmity. As has been made to appear hereinbefore, the fact that plaintiff had received such an injury was not stated in the application. This brings us to the principal points made by defendant association on appeal from an order denying its motion to vacate and set aside a verdict in plaintiff's favor, and for a new trial.

1. The rules which were laid down in this court in *Kausal v. Minnesota Farmers M. F. Ins. Ass'n*, 31 Minn. 17, (16 N. W. 430,) controlling in cases similar to this, need not be repeated here. Counsel for defendant association do not openly attack their correctness, but, with frequent allusions to the "fraud perpetrated by plaintiff when he signed an application in which he omitted

to state that his foot had been frozen many years before, that a small part of it had been amputated, and that the balance was more or less numb," they attempt to distinguish this case on the facts from that. The charge of fraud, as found summed up at one place in the brief, omitting counsel's italics, is thus put: "In this case Mr. Whitney says he stated the facts to the agent; the agent notified him that he would not write them down, and that he would write in an answer which the plaintiff knew to be false." Now, let us examine the undisputed testimony,—that of the plaintiff,—and see if there is anything tending to sustain the claim that he so actively and fraudulently co-operated with the alleged agent in withholding the facts from the association. Mr. Whitney testified that Crane "read the application over to me, and I answered all the questions he asked me. I made a full statement to him as to the condition of my foot,—the cause, etc. He said that it was of no consequence. I stated fully that it was injured by a frostbite, and from an injury received on snowshoes; that two toes and part of the bone back of the little toe were amputated, and sometimes there was numbness about it." In response to a further question, he said: "What I read here,—number 10,—I remember that he read it to me, and I answered as I have given you. I never read this document until now." Crane filled out the blank himself as plaintiff answered the questions. The latter knew that it purported to be an application for membership, but did not read it. There is nothing whatever in the evidence tending to indicate that plaintiff participated in the alleged misstatements, or had any knowledge of them. Certainly, knowledge of what Crane was doing, and that he was concealing the real facts, cannot be imputed to plaintiff from Crane's remark, when informed of the frozen foot and partial amputation, that "it is of no consequence." If plaintiff could draw any inference from this remark it was that such an infirmity would not influence the officers of the association whose duty it was to pass upon the application, or have any injurious effect in its consideration. We are clearly of the opinion, after an examination of the evidence, that, if misstatements were made and a fraud perpetrated upon the association when the blank application was filled out, Crane was responsible, not the plaintiff. If, then, it was shown on the trial that Crane was an agent of the defendant

association, the case is governed by the *Kausal Case*, in which it was held, among other things, that where an agent to procure and forward applications for insurance, either by his direction or direct act, makes out an application incorrectly, notwithstanding all the facts are correctly stated to him by the applicant, the error is chargeable to the insurer, and not to the insured. In conclusion upon this point, we will say that counsel for plaintiff, respondent here, have collected and cited in their brief a great number of cases in line with *Kausal v. Minnesota Farmers M. F. Ins. Ass'n*, *supra*, and in which the rules there laid down have been sanctioned and applied.

2. Relying upon the case of *Gude v. Exchange Fire Ins. Co.*, 53 Minn. 220, (54 N. W. 1117,) defendant contends that the agency of Crane was not sufficiently established. On the answer we do not think this claim open to defendant, for the acts of Crane in obtaining the application were therein adopted. Again, in its tenth request to charge, the defendant expressly assumed that Crane was its agent, and based its request upon the fact. Further, Crane solicited plaintiff to become a member of defendant association, pretending to be its agent, and produced and filled out the application, which was sent to the association, acted on by it when it issued the certificate, and the certificate was sent by it to Crane, who delivered it to plaintiff, and collected the premium. These facts easily distinguish this case from *Gude v. Exchange Fire Ins. Co.*, *supra*, and we think there was sufficient evidence of the agency of Crane. *Abraham v. North German Ins. Co.*, 40 Fed. 717; *Hahn v. Assurance Co.*, 23 Oregon 576, (32 Pac. 683;) *Gosch v. Association*, 44 Ill. App. 263; *Pierce v. The People*, 100 Ill. 11; *Deitz v. Providence-Washington Ins. Co.*, 31 W. Va. 851, (8 S. E. 616;) *Insurance Co. v. Williams*, 39 Ohio St. 584; *Packard v. Dorchester Mut. Ins. Co.*, 77 Me. 144; *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737, (28 N. W. 47.) In fact, there seems to be, practically, unanimity in the cases on this point.

There is nothing in the other questions raised by the assignments of error. Order affirmed.

Buck, J., absent, took no part.

On Application for Reargument.

July 9, 1894.

PER CURIAM. In a petition for reargument, counsel for appellant urge that this court overlooked the assignment of error whereby it was claimed that in the reply there was a clear departure from the cause of action set forth in the complaint. Should it be admitted that there was, the point was not properly made upon the trial below.

It is also urged that as it was distinctly held upon the trial that plaintiff was bound to know, and was held to have known, the contents of the application for membership, this court erred in applying the rule of the *Kausal Case*, 31 Minn. 17, (16 N. W. 430.) The decision does not proceed upon the theory, as counsel seem to think, that plaintiff can recover because, although he truthfully stated the facts to the agent, the latter, without plaintiff's knowledge, falsely answered the questions found in the application, but rather upon the theory that plaintiff was misled by representations of the agent as to the character or effect of his answers to the question concerning a bodily infirmity. The rule in the *Kausal Case* applies, assuming, of course, good faith on the part of the insured, and the absence of collusion between him and the agent; and, using language found in Wood on Insurance (section 407): "to mistakes arising from the misadvice of the agent or his misconception of the legal effect of certain conditions," the petition is denied.

(Opinion published 59 N. W. 943.)

v.57M.—31

STATE OF MINNESOTA *vs.* JAMES E. CONNELLY.

Argued June 1, 1894. Reversed June 15, 1894.

No. 8832.

Contradictory statements of prosecutrix.

Certain evidence *had* not impeaching, in the sense of being statements of the witness contrary to what she testified to on the trial, but evidence of facts or acts tending to disprove the facts stated by the witness, and hence not requiring any foundation to be laid for its introduction by first calling her attention to it.

Uncorroborated testimony of prosecutrix on a trial for rape.

The uncorroborated testimony of the prosecutrix in this case being somewhat improbable, and being impeached in some particulars by her own previous inconsistent statements, and in other particulars by the testimony of other witnesses, *had* not sufficient to justify a conviction of the crime of rape.

Appeal by defendant, James E. Connelly, from an order of the District Court of St. Louis County, *Charles L. Lewis, J.*, made January 18, 1894, denying his motion for a new trial after conviction of the crime of rape.

Allen & Baldwin, for appellant.

H. W. Childs, Attorney General, *John Dwan*, County Attorney, and *James A. Hanks*, for the state.

MITCHELL, J. The defendant was convicted of the crime of rape, alleged to have been committed March 19, 1893, upon a girl of the age of seventeen years. The girl was the foster daughter of one Thomas Hannon and wife, of whose family she had been a member for about twelve years. This family consisted of Mr. and Mrs. Hannon, the girl, and her three foster brothers, all of whom were young men. The family resided in the village of Two Harbors, in the county of Lake. The defendant was a priest, in charge of the Catholic church and congregation in that village, to which the Hannon family belonged. Some two days before the alleged commission of the offense, the defendant moved into a house next door to that of Hannon's, his family consisting of his married sister and her child; also another woman, in the capacity of housekeeper. The

latter, however, did not become an inmate of his house until a few days afterwards. The Hannons, including the girl, had some previous personal acquaintance with defendant while he was boarding at another house in the village. The defendant was convicted wholly upon the testimony of the prosecutrix. Without attempting to give it in full, her testimony may be fairly summarized as follows: She testified that on Sunday evening, March 19th, while she was on the porch of her own house, the defendant called her over to give her some pictures to put in her prayer book; that, upon going over, he took her upstairs into his bedroom; that she took a seat on a chair, and he on the bed; that, after conversing a short time on general subjects, defendant got a bottle of whisky out of a bureau drawer, poured some out into a glass, and drank it, and then poured out some more, and "put some stuff out of a little bottle into the glass with the liquor," and asked her to drink it; that she at first declined, but he insisted, saying it was wine; that she thereupon drank it, and knows it was whisky; that she soon "got weak, and began falling over a little;" that thereupon he picked her up, and put her on the bed, and ravished her; that she resisted all she could, and "hollered," but that he put his hands over her face, and accomplished his purpose by force; that, after the deed was committed, he got a revolver from his bureau, and, pointing it at her, told her he would kill her if she ever told; that she then returned home, and went to bed, it being then about nine o'clock, or the usual hour for retiring; that she never made any complaint or told any one about the matter until the 25th of the following May, when she told one of her brothers; that the reason she did not tell was because she was afraid defendant would shoot her if she did. She further testified that subsequent to this, and up to the early part of May, the defendant repeatedly had sexual intercourse with her in this same upstairs bedroom in his own house; that he made her go up there, and told her she had to, sometimes when she was out in the yard, and sometimes when she had gone over to his house; that she submitted, and did what he ordered, because he threatened to kill her if she did not. She further testified that she never went over to his house except when defendant ordered her to come, or when her mother sent her. She also testified that she was pregnant by defendant.

The particulars of her complaint to her foster brother on May 25th, of course, were not testified to, but it does appear that immediately afterwards the brother made complaint before a justice of the peace charging defendant with the crime of rape committed on May 4th. The testimony of the prosecutrix on this examination was in many particulars in conflict with her testimony on the trial on this indictment, but it is only fair to say that it appears that she was sick in bed, and quite weak, when she gave her evidence on the first examination. On defendant's hearing that the girl had made charges against him, his sister, at his instance, went to Hannons, and brought the girl over to defendant's house, where she made a written retraction of the charges, stating that they were untrue, and that defendant had never had sexual intercourse with her. This retraction she swears was extorted from her by force, but in this she is contradicted in whole or in part by defendant and his sister, and by a priest whom the bishop had sent out to investigate the charge.

Defendant, as a witness in his own behalf, positively denied the charge, testified that he never had intercourse with her, and that she was not even in his house on the evening of Sunday, March 19th, and as to this last fact his testimony was corroborated by other witnesses.

The testimony of the prosecutrix was entirely uncorroborated by any evidence, either direct or circumstantial, unless it be by the fact that she made complaint to her brother nearly ten weeks after the alleged commission of the crime.

Upon the trial, defendant offered to prove that early in May the prosecutrix was coming from defendant's house, when her mother reproved her for going there, whereupon she responded to her mother in an angry manner, and said: "I will. I am my own boss, and will go there when I please." Also, that on another occasion, in May, she asked another girl to go with her to defendant's house, accompanying the request with the remark, "Isn't he a nice man?" The court excluded this evidence, apparently on the theory that it was merely impeaching evidence, in the sense of being former statements of the witness, inconsistent with her statements on the trial, and that no foundation had been laid for its introduction. In this, we think, the court was in error. It was not impeaching.

evidence in any such sense. The evidence offered was not of contrary statements, but of facts or acts tending to disprove the facts stated by the witness, and did not require any foundation to be laid for its introduction. She had testified that she was forced by threats to go to defendant's house, and submit to him. The evidence offered was of acts tending to show that she was both willing and anxious to go. For this error a new trial must be granted.

But a more vital question is whether the evidence was sufficient to warrant a conviction. There is no rule of law which forbids a jury to convict of rape on the uncorroborated evidence of the prosecutrix, provided they are satisfied beyond a reasonable doubt of the truth of her testimony. But the courts have always recognized the danger of convicting on her uncorroborated evidence, for, in the language of Lord Hale, "it is an accusation easily made, hard to be proved, and still harder to be disproved by one ever so innocent."

Where the testimony of the prosecutrix is uncorroborated, and bears some intrinsic evidence of improbability, courts have sometimes refused even to submit it to the jury. In some states, corroborating evidence is required by statute.

Where the charge is true, there will almost always be some corroborating evidence, such as injury to the person or clothing of the prosecutrix, or the fact that she made complaint as soon as practicable, and without unreasonable delay. While the rule requiring immediate complaint is not inflexible, yet the unexplained failure to do so is always considered a very important fact. It is so natural as to be almost inevitable that a female upon whom the crime has been committed will make immediate complaint, if she have a mother or other confidential friend to whom she can make it. The rule is founded upon the laws of human nature. The excuse for a delay in this case for nearly ten weeks was the alleged threats of defendant to kill her, but it must be borne in mind that the very existence of this excuse rests upon the uncorroborated testimony of the prosecutrix; and it must be admitted that her statement is certainly somewhat remarkable. Had she been an inmate of defendant's house, with no friends or relatives accessible, her story would be more reasonable. But she was living with and under the protection of her own family, consisting of her father, mother, and three adult brothers. Making all reasonable allowance for her youth, and for

the influence which defendant's sacred office might have over her, yet it is certainly remarkable that, by reason of defendant's alleged threats, she should not only keep silence as to the crime committed against her on the 19th of March, but that for weeks afterwards she should be forced to return to his house, go up into his bedroom, and there submit to his desires, and then return to the bosom of her own family as if nothing unusual had occurred.

Her testimony certainly bears some characteristics of improbability; and, as already remarked, it is wholly uncorroborated by a single circumstance, such as injury to her person or clothing. It is more or less impeached by her own contradictory statements. It is flatly denied by the defendant, and is in important particulars contradicted by the testimony of other witnesses.

The crime is so abhorrent that, to some minds, to charge a person with it, raises a presumption of guilt. It is human nature to incline to the story of the female, especially if a young girl. But, while virtue and veracity are the rule with them, yet even young girls, like older females, sometimes concoct an untruthful story to conceal a lapse from virtue.

Hence all the authorities agree that this is a crime requiring special scrutiny by the jury, and a careful weighing of the evidence and all remote and near circumstances and probabilities in cases where the testimony of the female is not corroborated, and especially where the testimony is at all improbable or suspicious.

The defendant may be guilty of a grave offense, although not guilty of the crime of rape, and he may be guilty of the crime charged; but it has not, in our opinion, been established by the degree of proof required by law, to wit, beyond a reasonable doubt. We could not conscientiously permit the conviction to stand.

Order reversed, and a new trial granted.

COLLINS and BUCK, JJ., took no part in this decision.

(Opinion published 59 N. W. 479.)

ELGIN CITY BANKING CO. vs. JOHN ZELCH.

Argued June 4, 1894. Affirmed June 15, 1894.

No. 8790.

Indorsement by the law merchant.

The payee of a negotiable promissory note transferred it, with the following indorsements: "Pay to A. B. [Signed] C. D." "Payment guaranteed. [Signed] C. D." *Held*, that this was an "indorsement," in the commercial sense, and that the transferee was an "indorsee," under the law merchant.

Appeal by defendant, John Zelch, from an order of the District Court of Ramsey County, *Chas. D. Kcrr, J.*, made December 26, 1893, denying his motion for a new trial.

On November 19, 1891, at St. Paul, defendant made and delivered to Daniel Dunham his promissory note dated that day whereby he promised to pay to the order of said Dunham at Wayne, Ill., five hundred dollars and interest on or before January 1, 1893. The note was given in part payment for a horse that day sold to defendant by Dunham. Defendant claims that Dunham fraudulently represented and warranted the horse to be sound. That he was not sound and that defendant sustained damages exceeding the amount due on the note. On January 25, 1892, Dunham sold and delivered the note to the plaintiff, the Elgin City Banking Company, and endorsed thereon as follows: "Pay the Elgin City Banking Company. D. Dunham. Payment guaranteed. D. Dunham." This action was brought by the Elgin City Banking Company on the note. Defendant answered stating that the note was given in part payment for a horse fraudulently represented and warranted sound, its unsoundness and his damages and denying that plaintiff bought the note in good faith or for value. Defendant claimed that the peculiar indorsement of the note made it nonnegotiable, that plaintiff was merely an assignee of a chose in action and that it was subject to all equities and defences subsisting against Dunham. The trial court thought otherwise and ordered the jury to return a verdict for plaintiff for the amount of the note and interest. Defendant excepted, and afterwards moved for a new trial. Being denied, he appeals.

Morphy, Ewing, Gilbert & Ewing, for appellant.

The writing on the back of the note does not read "pay to the Elgin City Banking Co. or order." It omits the words "to" and "or order," and merely says, "pay the Elgin City Banking Co. Payment guaranteed." Plaintiff claims this is nothing more nor less than an indorsement with an enlarged liability. The writers on this subject differ and the cases are in conflict. Story Bills, § 458.

One of the oldest and one of the leading cases on the subject and one which is referred to in all text books is *Partridge v. Davis*, 20 Vt. 499, decided in 1848, which held that a written guaranty of the payment of a promissory note placed by the payee upon the back of the note for the purpose of negotiating it is the same in legal effect and for every practical purpose as an indorsement and may be treated as such and an indorsement made in the form of a guaranty will render the payee liable as indorser to any subsequent holder of the note upon proof of the proper demand and notice. The same principle was laid down in *Robinson v. Lair*, 31 Ia. 9; *Heard v. Dubuque County Bank*, 8 Neb. 10; *State Bank v. Haylen*, 14 Neb. 480.

Story on Bills (4th Ed.) § 215, and Daniel on Negotiable Instruments (3rd Ed.) § 1781, lean towards the negotiability of guaranties but they rely on such authorities as *Upham v. Prince*, 12 Mass. 13; *Blakely v. Grant*, 6 Mass. 386; *Heard v. Dubuque County Bank*, 8 Neb. 10, and others where the conclusions have either been questioned or the cases overruled.

But Mr. Ames in *Cases on Bills and Notes*, Vol. 1, p. 224, sets out the case of *Belcher v. Smith*, 7 Cush. 482, and in his notes says, that a payee or subsequent party who writes a guaranty upon a bill or note is not liable as indorser, is now well settled; that *Upham v. Prince*, 12 Mass. 13; *Bell v. Johnson*, 4 Yerg. 194 and *Leggett v. Raymond*, 6 Hill 639, are overruled.

The writing on the back of the note is merely a guaranty and nothing more. Dunham sold and transferred the note and guaranteed its payment. The writing cannot at the option of plaintiff be converted into an indorsement. The defences of the maker are not cut off. This can only be done by indorsement according to the law merchant. *Trust Co. v. National Bank*, 101 U. S. 68; *Snevilly v. Ekol*, 1 Watts & S. 203; *Lamourieuz v. Hewit*, 5 Wend. 307; *Mil-*

ler v. Gaston, 2 Hill 188; *Eastern Townships Bank v. St. Johnsbury & L. C. R. Co.*, 40 Fed. Rep. 423; *Omaha Nat. Bank v. Walker*, 5 Fed. Rep. 399.

The fact that the payee, Dunham, signed his name after the transfer as well as after the guaranty does not make the transaction other than one transaction. If a man signs his name more than once to an ordinary contract that fact alone does not make more than one contract.

John W. Best, for respondent.

The question of the negotiability of a guaranty so exhaustively treated in appellant's brief is not involved in the case at bar. Every authority cited by appellant deals with the question of the negotiability of a bare guaranty without any pretense at an indorsement, and for that reason his citations are not apropos.

In *Belcher v. Smith*, 7 Cush. 482, Smith's only indorsement was in the following words over his signature: "I hereby guarantee the within note." The only writing involved in the case of *Sample v. Martin*, 46 Ind. 226, is: "We guarantee payment." In *Tuttle v. Bartholomew*, 12 Met. 452, "We guarantee the payment of this note." In *Omaha Nat. Bank v. Walker*, 5 Fed. Rep. 399, the writing is as follows, "This note is transferred and the collection of the same guaranteed to the holder thereof." In *Robinson v. Lair*, 31 Ia. 9, the writing on the back of the note is as follows, "For value received we guarantee the payment of the within note and hereby waive demand and notice of nonpayment."

MITCHELL, J. The defendant executed his negotiable promissory note, payable to the order of one Daniel Dunham, who transferred it to the plaintiff, with the following indorsements: "Pay the Elgin City Banking Co. D. Dunham." "Payment guarantied. D. Dunham."

Whether these indorsements be construed as constituting a single contract, or two distinct and separate contracts, we are clear that they constitute an "indorsement," in the commercial sense, and that the transferee is an "indorsee," and entitled to protection as such, under the law merchant. The fact that Dunham enlarged his re-

sponsibility beyond that of "indorser," by guarantying payment, did not change or affect the character of his indorsement.

Order affirmed.

COLLINS and BUCK, JJ., absent, took no part.

(Opinion published 59 N. W. 544.)

JOHN BOUCK JR. *vs.* ELIZABETH D. BOUCK *et al.*

Submitted on briefs June 11, 1894. Modified June 15, 1894.

No. 8868.

Arbitration and award, in part bad.

Where all the orders of an award in arbitration are to be performed by the same party, some of which are bad, and others well awarded, the fact that some of the orders are bad furnishes no good reason for holding the party discharged as to those which are well awarded.

When the whole award must fail.

It is only where the good and bad parts relate to different parties, the void part being the consideration for the thing awarded on the other side, that the whole award must fail.

Judgment on the award.

The judgment should conform to the award.

Judgment erroneous which departs from the award.

Hence, where the arbitrators awarded a party a sum of money payable in several annual installments, it is error to order judgment for the whole amount payable immediately.

Appeal by Elizabeth D. Bouck and John S. Bouck her husband, from a judgment of the District Court of Mille Lacs County, *D. B. Searle, J.*, entered November 24, 1893.

On September 8, 1892, John Bouck, Jr., entered into an agreement with the appellants to submit to arbitration all demands between him and them and that judgment should be entered on the award. The three arbitrators chosen made their award October 27, 1892, and John Bouck, Jr. moved the court that the award be confirmed and

for judgment. Elizabeth D. Bouck and husband moved at the same time on affidavits to set aside and vacate the award. The court on September 5, 1893, ordered that the award be confirmed in so far as it awarded to John Bouck, Jr. \$800 for services rendered by him, but set aside and vacated the part directing that this sum be secured by mortgage on her farm and the part awarding that the note to Henry Bouck be surrendered and not enforced. Upon this order the clerk entered judgment November 24, 1893, in favor of John Bouck, Jr. that he recover against Elizabeth D. Bouck and John S. Bouck, her husband, \$859.11, being the amount of the award and interest. From this judgment they appeal.

Bruckart & Brower, for appellants.

Geo. H. Reynolds, for respondent.

MITCHELL, J. This appeal is from the judgment entered upon the award under what both parties assume and concede to have been a statutory submission to arbitration of all demands, of every name and nature, between plaintiff, on the one side, and the defendants, on the other. The award was as follows:

"We find that John Bouck shall be awarded the sum of eight hundred (\$800) dollars for services rendered; said sum of money to be paid in four equal payments, of \$200 each; the first payment to be made after this award is approved by the court, and two hundred (\$200) dollars thereafter every year for three years; each payment to become due and payable twelve months after the other; said deferred payments to be secured by mortgage to be given by Elizabeth D. Bouck and John S. Bouck, her husband, upon that certain farm in Morrison county to John Bouck. We further make it a condition of this award that a certain note given by John Bouck to Henry Bouck, and now presumably held by Elizabeth D. Bouck and husband, shall be returned to John Bouck, and collection shall not be enforced. The deferred payments shall bear interest at the rate of eight per cent. per annum."

Upon the motion of the plaintiff for the confirmation of the award, and for judgment thereon, and the cross motion of the defendants to reject and vacate the award on the several statutory grounds, the court confirmed that part of the award which awarded plaintiff \$800, but rejected and vacated those parts which required defendants to se-

cure the payment of the \$800 by mortgage, and to return or surrender the note which they were supposed to hold against plaintiff, and then ordered that judgment be entered in favor of plaintiff, and against defendants, for \$800, with interest from the date of the award.

It will be observed that all parts of this award are in favor of the plaintiff, and all its orders are to be performed by the defendants; and therefore, if some of these are good and some bad, the defendants can lose nothing by being relieved, as they were, from performance of the bad parts. The general rule is therefore applicable that "if the same party is required to do several things, and as to some of them the award is bad, on the ground of uncertainty, or because the arbitrators have exceeded their powers, this can furnish no good reason for holding the party discharged as to those things which are well awarded." It can only be "where the good and bad relate to different parties, and the void part of the award is the consideration or recompense of the thing awarded on the other side," that the whole award must fail. *Nichols v. Rensselaer Co. M. Ins. Co.*, 22 Wend. 125; *Gordon v. Tucker*, 6 Me. 247. If plaintiff was objecting, it might well be held that, if part of the award was bad, the whole should be held void, because he would not be receiving the full benefit intended; but, if he is content, it does not lie in the defendants' mouths to object that they have been relieved from performance of some of the orders of the award. There was therefore no error—at least none prejudicial to defendants—in vacating the other parts of the award, and confirming that which awarded plaintiff \$800.

But the objection to the judgment is that it does not conform to the award. The award was for \$800, payable in four equal installments,—one on the confirmation of the award; and the other three, yearly thereafter, with eight per cent interest. The record contains nothing but the award. We do not know why the arbitrators made the \$800 payable by installments. It might have been because the claim was not due or payable until the dates fixed. Presumably, the time for payment was given for some good legal reason, and constituted a material consideration in fixing the amount of the award; and for the court, under the circumstances, to order a judgment for \$800, payable immediately, was practically to make a new award.

The judgment must be modified so as to make it payable by installments, in accordance with the terms of the award.

Cause remanded, with directions to modify the judgment accordingly.

(Opinion published 59 N. W. 547.)

KATHARINE SCHULTZ *vs.* JOHN S. BOWER.

Argued June 5, 1894. Reversed June 15, 1894.

No. 8795.

57	493
164	123
57	493
166	281
57	498
85	68

View by the jury of the locus in quo, not evidence.

The charge of the court construed as instructing the jury that they might use as evidence in the case what they saw or learned upon a view of the premises, and for that reason *held* erroneous.

Lateral support of land by adjacent soil.

The right of lateral support of land from the adjacent soil is an absolute right of property, and the right to recover for injuries to the land by reason of the removal of such support does not depend upon negligence, but upon the violation of the right of property.

Measure of damages.

The actionable wrong is causing the soil to fall by removing its lateral support, and the measure of damages is the diminution of the value of the land by reason of such fall.

Appeal by defendant, John S. Bower, from an order of the District Court of Hennepin County, *Henry G. Hicks, J.*, made January 6, 1894, denying his motion for a new trial.

The plaintiff, Catharine Schultz, owns vacant lots sixteen, eighteen and nineteen in Auditor's Subdivision No. 33 on the left bank of the Mississippi River in Minneapolis. Defendant owns the adjacent land on the south and manufactures brick there. He dug down twenty feet or more and removed the clay so close to plaintiff's land that some of the soil of her land caved away and fell in for over one hundred feet along the line. The soil is sandy loam on top and brick clay underneath. She brought this action to recover damages for removing the lateral support to her ground.

After the evidence was all in the Judge sent the jury in charge of an officer to view the premises, stating to them as follows:

You must not talk together concerning this case, but each one of you must carefully view the premises so as to form an opinion for yourselves in connection with the evidence of what the damages are and to enable you to determine the truthfulness or veracity of the statements made in the court by the witnesses.

To this instruction defendant excepted. After the jury had been out and examined the premises the Judge charged them among other things, that the true rule of damages in this case is the diminution in value of plaintiff's land by reason of the soil being taken away; that is, whatever less its market value is by reason of the removal of that lateral support. To this defendant also excepted. Other instructions given are stated in the opinion. The jury returned a verdict for plaintiff and assessed her damages at \$500. Defendant moved for a new trial. Being denied he appeals.

Little & Nunn, for appellant.

The object in viewing the premises was to enable the jury to better understand and comprehend the testimony of the witnesses and thereby more intelligently to apply the testimony to the issues to be determined, but not to furnish evidence upon which to find a verdict nor to determine the veracity of witnesses. *Chute v. State*, 19 Minn. 271; *Brakken v. Minneapolis & St. L. R. Co.*, 29 Minn. 41; *Close v. Samm*, 27 Ia. 503; *Hedy v. Vevay, &c., Turnpike Co.*, 52 Ind. 117; *Wright v. Carpenter*, 49 Cal. 609.

M. C. Brady, for respondent.

A man has the right to support his own land by the adjoining land and if his neighbor digs down so as to deprive him of that support and his land caves in, he has a right of action although his neighbor may exercise all the care and skill he can. He is absolutely bound to make good the damages. *Ulrick v. Dakota L. & T. Co.*, 2 S. Dak. 285; *Stearns v. City of Richmond*, 88 Va. 992; *Richardson v. Vermont C. R. Co.*, 25 Vt. 465; *Foley v. Wyeth*, 2 Allen 181; *Hay v. Cohoes Co.*, 2 N. Y. 159; *Thurston v. Hancock*, 12 Mass. 220; *McGuire v. Grant*, 25 N. J. Law, 356; *Gilmore v. Driscoll*, 122 Mass. 199.

MITCHELL, J. This was an action for damages for the wrongful act of the defendant in removing the lateral support of plaintiff's soil from the adjacent land, causing it to fall. The jury was sent out to view the premises. This is allowed, not for the purpose of furnishing evidence upon which a verdict is to be found, but solely for the purpose of better enabling the jury to understand and apply the evidence given in court. *Chute v. State*, 19 Minn. 271, (Gil. 230;) *Brakken v. Minneapolis & St. L. Ry. Co.*, 29 Minn. 43, (11 N. W. 124.)

When the court sent the jury out, he instructed them to carefully view the premises, so as to form an opinion for themselves, in connection with the evidence, of what the damages were; and in the charge the jury were told that they had been permitted to look the premises over, so that they might have another standard by which to gauge the evidence they had heard in court; that it might perhaps help them in determining whether the witnesses for the plaintiff or the witnesses for the defendant had more nearly told the truth in regard to the damages to the premises. And again, when asked by a juror whether "they had to go according to the evidence or not," the court told them they had to go by the evidence, but added that testimony was one thing, and evidence was another; that "testimony" was the words they heard in court, and "evidence" what they considered it worth; that they were not bound to accept as true the statements of witnesses as to the damages, but had a right to weigh them with their common sense, judgment, and experience, aided by what they saw on the premises; that they were not sent out to go blindfolded, and see nothing, but to see what they could, as business men, in the light of their experience; and that they must determine the issue in the case by the evidence given in court, "and in the light of what they saw there."

While the court did, in the course of the charge, instruct the jury in general terms that they should be guided by the evidence given in court,—that that was the evidence by which they were bound if they believed it to be true,—yet the instructions which we have referred to were not withdrawn, or in any way expressly modified.

Our opinion is that, taking the charge as a whole, its fair import is that the jury might use what they saw or supposed they had learned on the view as evidence in the case, at least for some purposes. This, we think, is the way it would be naturally understood by the jury. This was error, for which a new trial must be granted.

There are one or two suggestions as to the law of such cases which it may be well to make in view of a second trial. The right of lateral support from the adjacent soil is an absolute right of property; and, as a consequence of this principle, it follows that for any injury to his soil, resulting from the removal of the natural support to which it is entitled, by means of excavation on an adjoining tract, the owner has a legal remedy against the party by whom the mischief has been done. This does not depend upon negligence, but upon the violation of the right of property. *Nichols v. City of Duluth*, 40 Minn. 389, (42 N. W. 84;) *Foley v. Wyeth*, 2 Allen, 131; *Gilmore v. Driscoll*, 122 Mass. 199; *McGuire v. Grant*, 25 N. J. Law, 362. This unqualified or absolute right of lateral support applies only to the land itself, and not to the buildings or other artificial structures. Where one, by digging in his own land, causes the adjoining land of another to fall, the actionable wrong is not the excavation, but the act of allowing the other's land to fall. Sedg. Dam. § 925.

Hence the measure of damages is the diminution of the value of the land by reason of the falling of the soil; and it is immaterial whether this falling be called "caving" or "washing," provided it is the natural and proximate result of removing the lateral support. Order reversed.

COLLINS and BUCK, JJ., absent, took no part.

(Opinion published 59 N. W. 631.)

JACOB BARGE *vs.* JOHN VAN DER HORCK.

Submitted by appellant. Argued by respondent June 6, 1894. Reversed June 15, 1894.

No. 8651.

Contribution among sureties—Facts stated.

B. and M. being cosureties for W. on one note, and B. and V. cosureties for him on another note, W. assigned to B. and V. certain collaterals to secure them for their liabilities as sureties on these notes. B. having been compelled to pay one-half of the first note, and B. and V. having been each compelled to pay one-half of the other note, they divided the proceeds of the collaterals between themselves pro rata, supposing they were held exclusively for their own benefit, and not understanding that M., as cosurety with B., might have a right to demand a share of the fund. Subsequently, M.'s estate, having paid his half of the first note, brought suit against B., and compelled him to pay its pro rata share of the proceeds of the collaterals. *Held*, that B. had a right to compel V. to contribute his share of the amount thus recovered by M.'s estate; that the rule that money voluntarily paid under a mistake of law cannot be recovered does not apply.

Appeal by plaintiff, Jacob Barge, from an order of the District Court of Hennepin County, *Seagrave Smith, J.*, made January 6, 1894, sustaining the demurrer of John Van Der Horck, defendant, to his complaint. The facts are stated in the opinion and in *Mueller v. Barge*, 54 Minn. 314.

Penney & Hayne, for appellant.

A. D. Smith, for respondent.

MITCHELL, J. This action is the sequel of that of *Mueller v. Barge*, 54 Minn. 314, (56 N. W. 36,) having been brought to compel defendant to contribute his pro rata share of the money which, under our decision in that case, plaintiff, Barge, was compelled to pay to the estate of Mueller. This appeal is from an order sustaining a demurrer to the complaint on the ground that it does not state a cause of action. The facts stated in the complaint are substantially those stated in the opinion in *Mueller v. Barge*, and may be epitomized in their chronological order as follows: Westphal, as principal, and Barge and Mueller, as sureties, executed to Jonas F. Brown a note v.57m.—32

for \$4,000. Westphal, as principal, and Barge and Van Der Horck, as sureties, executed to Henry F. Brown a note for \$10,000, and, at the same time, Westphal assigned to Barge and Van Der Horck certain shares of stock for the purpose of securing them as indorsers or sureties on the \$10,000 note, and of securing Barge as indorser or surety on the \$4,000 note.

Barge and Mueller took up the \$4,000 note by each giving to Jonas F. Brown his individual note for \$2,000. Barge paid his note for \$2,000. Barge and Van Der Horck paid the \$10,000; each paying one-half, or \$5,000. Barge and Van Der Horck sold the stock assigned to them by Westphal for \$9,000, and believing and understanding that it was given and received solely for the purpose of securing them, and nobody else, divided the proceeds between themselves, in good faith, in accordance with the understanding,—Barge taking seven-twelfths, or \$5,250; and Van Der Horck, five-twelfths, or \$3,750.

The estate of Mueller paid his note for \$2,000 to Jonas F. Brown, and then brought suit against Barge to compel him to contribute or pay over a pro rata share of the proceeds of the stock. The result of that suit was that Barge was compelled, for the reasons stated in *Mueller v. Barge, supra*, to pay the estate of Mueller \$1,285.72,—that is, two-fourteenths of the \$9,000; and Barge now sues to compel Van Der Horck to contribute five-twelfths of this, or \$535.70, out of the \$3,750 which he received in the division of the proceeds of the collateral stock.

The only contention of defendant worthy of special consideration is that the division of the proceeds of the collateral stock between himself and plaintiff was in the nature of a voluntary payment under a pure mistake of law, and therefore that none of the money can be recovered back. We do not think the rule of law invoked has any application to the facts. It will be observed that the transaction was not the settlement or compromise of a doubtful or disputed claim of the one against the other, but merely the division between themselves of a fund held by the two in accordance with their supposed respective rights. The mistake, if any, was not as to the legal scope of what they were then doing, to wit, dividing the fund, but as to what were their own antecedent legal rights and liabilities in respect to the fund under and by virtue of the prior transaction;

they not then understanding that, under these previous transactions, Mueller might, as cosurety with Barge, have a right to share in the fund. The division which they made was in exact accordance with their legal rights, as between themselves, in case Mueller never called for a contribution. At the time this division was made, Mueller's estate had not paid the \$2,000 to Brown, and had not asserted any right of contribution, and might never do so. But since this division was made a new state of facts has arisen. Mueller's estate has paid the note, asserted its right to the fund, and compelled Barge to contribute. The result is that Barge now has \$535.70 less, and Van Der Horck that much more, of the common fund than he is entitled to.

Whether the division was not made under what would be considered a mistake of fact, it is not necessary to decide. Under the circumstances the division of the fund must be deemed merely provisional, and subject to the contingency of readjustment in case a new state of facts should arise. This has arisen, by reason of the subsequent successful assertion by Mueller's estate of its right to a share of the money. Barge having been compelled to satisfy that demand against the common fund, equity and good conscience require that Van Der Horck should contribute his pro rata share.

Order reversed.

COLLINS and CANTY, JJ., took no part in this decision.

(Opinion published 59 N. W. 630.)

DAVID M. COCHRAN *vs.* LEVI M. STEWART *et al.*

Argued May 25, 1894. Affirmed June 15, 1894.

No. 8760.

Evidence considered.

Evidence *held* to justify the findings.

Vendor of a chose in action estopped by his bill of sale.

Where a thing is sold for cash, but a check is accepted for the purchase money, and the property is delivered on the implied condition that the check will be paid on presentation, but the vendor gives to the vendee an

absolute bill of sale or assignment of the property, he will be estopped from asserting that the delivery was conditional, as against a subvendee in good faith, for value, who purchased in reliance on the vendee's muniments of title.

(Seal) is a sufficient device for a seal.

The word "Seal," affixed to an instrument, is a sufficient device, by way of seal, to entitle an instrument to record.

Appeal by plaintiff from an order of the District Court of Hennepin County, *Charles M. Pond, J.*, made December 26, 1893, denying his motion for a new trial.

William Clendenin was on November 1, 1856, the owner of the southeasterly part of Block 82 in Minneapolis fronting southeast 339 feet on Hennepin avenue between Fourth and Fifth streets. He and wife on that day gave a power of attorney to Gordon Jackins authorizing him to sell and convey any and all his real estate. Under this power Jackins conveyed this real estate on June 27, 1859, to Reuben Fenderson. He and wife on November 26, 1862, conveyed to Levi M. Stewart, one of the defendants in this action. But Clendenin had mortgaged the property on June 6, 1857, to Harvey Vinal of Springfield, Ohio, to secure the payment of two notes, one for \$216 due in six months and the other for \$1,416 due in one year. On August 31, 1858, Vinal sold the notes to Simon P. Snyder and William K. McFarlane, doing business at Minneapolis under the firm name of Snyder & McFarlane. At their request Vinal made a transfer on the back of each note and made a separate assignment of the mortgage. The name of the purchaser was left blank in all three of these instruments.

Snyder & McFarlane were indebted to David M. Cochran of Springfield, Ohio, \$2,128.33, for which sum he held their note dated that day. For his security they inserted his name in the assignment on the back of each note and also delivered to him the assignment of the mortgage without filling in the name of an assignee. On May 11, 1859, Snyder & McFarlane wrote to Cochran that if he would reassign the notes and mortgage they would pay him \$1,600 on their note to him. He thereupon wrote on each of the Clendenin notes an assignment thereof by him, but left a blank for the assignee's name. He then sent the notes with the assignment of the mortgage still in blank to his agent, J. C. Williams, at Minneapolis, to

be delivered to Snyder & McFarlane upon payment by them of \$1,600 which he was to indorse on their note. They paid the \$1,600 by check of Joseph Ogby & Co. on a bank in Philadelphia, Pa. The check proved to be worthless. They received from Williams the two notes and inserted in the assignments thereon the name of Reuben Fenderson as assignee. They also received the assignment of the mortgage and inserted therein the name of Ivory F. Woodman as assignee. He assigned the mortgage to Fenderson, and Fenderson on June 29, 1859, borrowed \$500 of Jesse L. Wetmore and as security assigned to him the two notes and mortgage. He took them in good faith without notice of any infirmity in Fenderson's title. Wetmore did not record his assignment until March 27, 1863. He foreclosed the mortgage June 4, 1863, under a power therein and William S. Chapman of San Francisco, Cal., became the purchaser at the foreclosure sale. No redemption was made and he on August 29, 1865, conveyed to defendant, Levi M. Stewart.

David M. Cochran, finding the check for \$1,600 to be worthless, repudiated his transfer of the Clendenin notes and mortgage and commenced an action September 10, 1860, against Simon P. Snider, William K. McFarlane, Ivory F. Woodman, Reuben Fenderson and William Clendenin to set aside his transfer and to foreclose the mortgage. Jesse L. Wetmore was not made a party to the action. Such proceedings were had that on May 11, 1863, a decree was entered that Cochran was as against those defendants still the owner of the Clendenin notes and mortgage and directing a sale of the real estate to pay the debt. The sale was made by the sheriff July 23, 1863, to David M. Cochran for \$2,350. This sale was confirmed, no redemption was made and on April 5, 1867, he commenced the present action of ejectment against Levi M. Stewart and Warner P. Curtis, his tenant, to recover possession of the property. A jury was waived, and on February 29, 1870, the issues were tried before *C. E. Vanderbilt*, then a judge of the District Court. He, on March 30, 1872, filed his findings and decision for plaintiff. The defendants moved for a new trial, but were denied. On appeal that order was reversed. *Cochran v. Stewart*, 21 Minn. 435.

David M. Cochran died intestate at Springfield, Ohio, unmarried and without issue. His father, Robert Cochran, inherited his property. The father died testate and his will was admitted to probate

in Hennepin County, June 6, 1892, and this property was assigned to his son, A. P. Linn Cochran, and he was substituted as plaintiff in the action. A second trial was had December 8, 1892, before *Chas. M. Pond*, Judge, without a jury. He made findings and ordered judgment for defendants. In a note attached to the findings the Judge said:

The question is, who was the real owner and entitled to the possession of the Clendenin notes and mortgage at the time of their foreclosure by Jesse L. Wetmore. Was he then entitled to them as collateral security for the payment of the Woodman note for \$500 or was David M. Cochran then entitled to them as collateral security for the payment of the Snyder & McFarlane note for \$2,128.33? This question was directly passed upon by the Supreme Court upon evidence not differing materially from that now before this court, and the court there held that Wetmore was the lawful owner of the notes and mortgage for value and in good faith, and had the right of foreclosure. If, however, this question so determined be not in this trial *res judicata* as between the parties but is still open for further consideration, the findings of the court herein if justified by the evidence must close the contention in defendant's favor. It is then under my view of the law wholly immaterial in this case whether the Wetmore foreclosure proceedings were regular and authorized or irregular and void. That would be no matter of any concern to the plaintiff. If Wetmore was then the lawful holder of these securities and entitled to foreclose the mortgage the defendant Stewart is certainly a mortgagee in possession, if no more, and as against the plaintiff in this action, he is entitled to the possession of the premises. The plaintiff must recover, if at all, upon the strength and force of his own title to the premises, and not upon any infirmity in that of the defendant Stewart.

The plaintiff moved for a new trial, but was refused, December 26, 1893. From this order he appeals.

Gilfillan, Belden & Willard, for appellant.

The material findings of the court relating to the transfer and delivery of the Clendenin securities by Williams acting for Cochran, to Snyder & McFarlane, or to Snyder and Woodman, were not warranted by the evidence.

To sustain these findings there must have been evidence reasonably tending to show that payment was received or waived by Williams. There is no pretence that it was received. There can be none that it was waived unless there was something in the transaction that excepts it from the general rule that a check is not *prima facie* payment. *Fishback v. Van Dusen & Co.*, 33 Minn. 111; *National Bank of Commerce v. Chicago, B. & N. R. Co.*, 44 Minn. 224; *Globe Milling Co. v. Minneapolis Elevator Co.*, 44 Minn. 153.

The fact that the check was that of a third person cuts no figure. This money was to be applied upon a pre-existing debt and in such cases the rule is universal that the acceptance of the obligation of a third person is not *prima facie* payment and raises no presumption different in nature or degree from the acceptance of that of the vendee. *Benjamin Sales*, § 1083, and cases cited in Note 19; *Combination S. & I. Co. v. St. Paul City Ry. Co.*, 47 Minn. 207; *Leven v. Smith*, 1 Denio, 571; *Smith v. Dennie*, 6 Pick. 262.

The necessity for the commencement of the exercise of active diligence by the seller in reclaiming his property when the evidence of title and possession have been delivered to the buyer, depends upon the circumstances of the case, the distance of the parties from each other, the character of the property sold, and various other things and especially dates from the time the buyer first manifests a disposition or purpose to avoid his obligation to perform the condition of the contract of sale. There are other considerations of greater importance than the mere lapse of time in determining the question of negligence in these cases. The character of the property, whether perishable or immediately consumable, or the contrary, the known intent of the buyer in respect to the matter of the use to be made of the property, whether to be retained or immediately resold, as in the case of merchants buying merchandise and graindealers buying grain, and the like. *Globe Milling Co. v. Minneapolis Elevator Co.*, 44 Minn. 153; *Dean v. Yates*, 22 Ohio St. 388; *Coggill v. Railway Co.*, 3 Gray, 545; *Deshon v. Bigelow*, 8 Gray, 159; *Armour v. Pecker*, 123 Mass. 143; *Hirschorn v. Canney*, 98 Mass. 149; *National Bank of Commerce v. Chicago, B. & N. R. Co.*, 44 Minn. 231; *Zuchtmann v. Roberts*, 109 Mass. 53.

The finding and conclusion that Cochran waived his rights by

omission to diligently assert them after the delivery of the securities are not warranted.

This evidence shows that Cochran did everything required. He was not in fault for want of rescission, that is, in not returning the check, for two reasons:

First. Because there was nothing to rescind. The condition had not been performed and so the absolute title still remained in him. *Marston v. Baldwin*, 17 Mass. 605; *Brown v. Haynes*, 52 Me. 581; *Robbins v. Phillips*, 68 Mo. 100; *Coggill v. Hartford & N. H. R. Co.*, 3 Gray, 545.

Second. He was not bound to return this check because it was of no value to Snyder & McFarlane, and because no prejudice could result to them from withholding it. They did not endorse or become responsible upon it in any way, and if they had it would probably not alter the condition in this case. It would have only been a promise to pay a debt which they were already obligated to pay. *Frost v. Lowry*, 15 Ohio, 200; *Sheldon Axle Co. v. Scofield*, 85 Mich. 177; *Compton v. Parsons*, 76 Mo. 455; *Holmes v. Briggs*, 131 Pa. St. 233.

There is no ground for estoppel or waiver because Wetmore had not been misled by Cochran or through his laches. A *bona fide* purchaser in a conditional sale has no equities superior to those of the owner. *Coggill v. Hartford & N. H. R. Co.*, 3 Gray, 545.

But conceding that Cochran under ordinary circumstances would have owed Wetmore some equitable duty in respect to the matter of notice of his claim there is no reason shown for applying the rule in this case, because he had no knowledge or ground for suspicion that the securities had been transferred to Wetmore. The transfer was not recorded until three years and nine months after it was made and not until Cochran's action against Snyder and others to foreclose the mortgage had nearly proceeded to judgment. This seems evident, considering that Wetmore was a resident of California and entirely unknown to Cochran and that he had no known agent in this state, and that the assignments were deliberately kept from the record, and that Cochran had no hint or suggestion that any such transfer had been made.

On the former appeal this court considered only the facts found by the court below and determined upon those facts that the plain-

tiff was not entitled to recover, and that so far as then appeared the defendant must prevail. Having so determined, it ordered the case returned for a new trial generally imposing no limitations. This decision and order left the parties at liberty to retry the question of title to the property subject to the rules of law then determined. *Jordan v. Humphrey*, 32 Minn. 522; *Ehrichs v. De Mill*, 75 N. Y. 370; *Hughes v. Detroit, G. H. & M. Ry. Co.*, 78 Mich. 399.

The defendant cannot stand upon the claim that he is a mortgagee in possession by establishing title to the notes alone, because he has not pleaded such a claim and his evidence was objected to for any such purpose. *Hersey v. Lambert*, 50 Minn. 373. Under the circumstances in this case no prejudice should result to the plaintiff from delaying the prosecution. It has always been in the power of the defendant to bring this litigation to a final issue. *Auerbach v. Geiseke*, 40 Minn. 258.

Young & Lightner, for respondents.

The former decision of this court is conclusive in this second appeal upon the same state of facts presented on the former appeal. The former decision is the law of the case. *Matthews v. Sands*, 29 Ala. 136; *Montgomery v. Gilmer*, 33 Ala. 116; *Polack v. McGrath*, 38 Cal. 666; *Russell v. Harris*, 44 Cal. 489; *New Haven & N. Co. v. State*, 44 Conn. 376; *Kingsbury v. Buckner*, 70 Ill. 514; *Loomis v. Cowen*, 106 Ill. 660; *Gerber v. Friday*, 87 Ind. 366; *Lillie v. Trentman*, 130 Ind. 16; *Smith v. Brannin*, 79 Ky. 114; *Mynning v. Detroit L. & N. R. Co.*, 67 Mich. 677; *Damon v. De Bar*, 94 Mich. 594; *Metropolitan Bank v. Taylor*, 62 Mo. 338; *Adair County v. Ownby*, 75 Mo. 282; *Joslin v. Cowee*, 56 N. Y. 626; *Yale v. Dederer*, 68 N. Y. 329; *Brandon v. Fritz*, 94 Pa. St. 88; *Du Pont v. Davis*, 35 Wis. 631; *Benjamin v. Covert*, 55 Wis. 157; *Supervisors v. Kennicott*, 94 U. S. 498; *Clark v. Keith*, 106 U. S. 464; *Wilson v. Wilson*, 5 H. L. Cas. 40.

The decision is not merely conclusive upon the questions decided or argued by counsel. It is equally so upon all matters presented by the former record and involved in the matters directly decided. And it is enough that the questions sought to be raised on the second trial or appeal were presented by the record on the

former appeal, whether counsel raised them or not. They should have done so. The presumption is that every question presented by the record and involved in the decision of the former appeal was considered, whether raised by counsel or not. *Nichols v. Bridgeport*, 27 Conn. 459; *Ogden v. Larrabee*, 70 Ill. 510; *Smith v. Brannin*, 79 Ky. 114; *Chouteau v. Gibson*, 76 Mo. 38; *School Trustees v. Stocker*, 42 N. J. Law 115; *Bangs v. Strong*, 4 N. Y. 315; *Joslin v. Cowee*, 56 N. Y. 626.

The rule that the decision on a former appeal is the law of the case and conclusive on a second appeal in the same action has been several times recognized and applied by this court. *Ayer v. Stewart*, 16 Minn. 89; *Lough v. Bragg*, 19 Minn. 357; *Schleuder v. Corey*, 30 Minn. 501; *Lindley v. Groff*, 42 Minn. 346; *Stapp v. Steamboat Clyde*, 44 Minn. 510; *Tilleny v. Wolverton*, 54 Minn. 75.

And where a cause has been tried, appealed and reversed and a second trial had and a second appeal taken, the appellate court on the second appeal will take judicial notice of the record made and the case thereby presented on the former appeal, and also of the briefs and arguments of counsel. *Miller v. Jones*, 29 Ala. 174; *McKinlay v. Tuttle*, 42 Cal. 570; *Poole v. Seney*, 70 Ia. 275; *Hubbs v. Kaufman*, 40 La. Ann. 320; *Blesch v. Chicago & N. W. Ry. Co.*, 48 Wis. 168; *Corning v. Troy Iron & N. Co.*, 15 How. 451.

The record of the Woodman assignment to Fenderson showed signature and seal thus: "Ivory F. Woodman. (Seal)" The word "seal" was affixed by Woodman by way of seal. *Res ipsa loquitur*. *Brown v. Jordhal*, 32 Minn. 135; *Hudson v. Poindexter*, 42 Miss. 304; *Lewis v. Overby*, 28 Gratt. 627; *Hacker's Appeal*, 121 Pa. St. 192.

The action is ejectment on the legal title. The complaint alleges simply a legal title, sets out no facts that would constitute an equitable title or ground for equitable relief. On such a complaint the plaintiff cannot show an equitable title or any equities entitling him to possession. *Duford v. Lewis*, 43 Minn. 26; *Merrill v. Dearing*, 47 Minn. 137; *Stuart v. Lowry*, 49 Minn. 91; *Sutton v. Aiken*, 57 Ga. 416.

Wetmore acquired a complete title by estoppel. This is one of the grounds of the decision on the former appeal in this case. 21

Minn. 435. Title by estoppel in pais is a legal title. For all purposes of attack and defense, in ejectment or any other action, it is equivalent to a deed from the person estopped. *Dickerson v. Colgrove*, 100 U. S. 578; *George v. Tate*, 102 U. S. 564; *Lowell v. Daniels*, 2 Gray 161; *Barnard v. German-Am. Seminary*, 49 Mich. 444; *Trustees of Brookhaven v. Smith*, 118 N. Y. 634; *Beaupland v. McKeen*, 28 Pa. St. 124.

Authority to fill blanks in sealed instruments may be given by parol. The grantor's signature and the certificate of acknowledgment were a continuing representation that the instrument was complete when delivered. This representation so made and the purchasers parting with value in reliance on it and in ignorance of its falsity make a complete estoppel. *State v. Young*, 23 Minn. 551; *Pence v. Arbuckle*, 22 Minn. 417; *Dobbin v. Cordiner*, 41 Minn. 165; *Phelps v. Sullivan*, 140 Mass. 36.

So far as any condition attached to Williams' authority is concerned, the case is within the rule of *McCord v. Western Union Tel. Co.*, 39 Minn. 181, as restated in *National Bank of Commerce v. Chicago, B. & N. R. Co.*, 44 Minn. 224.

The owner who intrusts another with or leaves such other in possession of the indicia of absolute ownership or right of disposition of a chose in action, is estopped to assert title against a purchaser to whom such person in violation of instructions or even in fraud of such owner has transferred the title for value, the purchaser having bought in reliance on such indicia of title and right of disposition. *Merchant v. Woods*, 27 Minn. 396; *Bausman v. Faue*, 45 Minn. 412; *Queen v. Shropshire Union Co.*, L. R. 8 Q. B. 420; *Cowdrey v. Vanderburgh*, 101 U. S. 572; *Arnold v. Johnson*, 66 Cal. 402; *Winton v. Hart*, 39 Conn. 16; *Western Union R. Co. v. Wagner*, 65 Ill. 197; *Williams v. Fletcher*, 129 Ill. 356; *Spooner v. Cummings*, 151 Mass. 313; *Grocers' Bank v. Neet*, 29 N. J. Eq. 449; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; *Wood v. Smith*, 92 Pa. St. 379; *Baker v. Taylor*, 54 Minn. 71.

MITCHELL, J. This case reappears in this court after an absence of nearly 20 years. 21 Minn. 435.

The facts are sufficiently stated in the opinion on the former

appeal. The vital question now, as then, is whether, as between Wetmore and Cochran, the former was the owner of the Clendenin mortgage at the time of its foreclosure, in 1863.

The evidence as to Wetmore's title to the mortgage, and as to his being a purchaser in good faith, for value, presented by the present record is, in all material respects, the same as on the former appeal. It is not quite apparent, therefore, why every question raised on this appeal is not *res judicata* by the former decision, as "the law of the case." But it is not necessary to consider this question. The gist of plaintiff's contention is that the evidence did not justify the two pivotal findings of the trial court, to wit: *First*, that Williams had authority from Cochran to transfer and deliver the Clendenin notes and mortgage to Snyder & Woodman for Ogby & Co.'s check for \$1,600; *Second*, that such transfer and delivery were unconditional. The objection made to the first finding is that the evidence shows that Williams' only authority was to deliver on payment of cash; and the objection to the second is that the evidence shows that the delivery was subject to the implied condition that Ogby & Co.'s check would be paid on presentation. But in our opinion both findings were amply justified by the contents of Cochran's letter of May 17th to Williams, and the fact that when Cochran received the check he did not return it, but himself presented it for payment, and, as late as September, was trying to collect it, and in fact never did return it, and the further fact that when, as late as 1860, he brought an action to reclaim and foreclose the Clendenin mortgage, he did not claim that Williams had exceeded his authority, or that the delivery of the notes and mortgage to Snyder & Woodman was conditional, but predicated his right of recovery exclusively upon the ground that the act of Williams was procured to be done by the fraudulent representations of Snyder & Woodman that the check was good, and prayed for relief against the assignment of the mortgage "so fraudulently procured."

But, even if, as between the original parties, the evidence would not have justified the findings, it certainly does as between plaintiff and Wetmore, as an innocent purchaser for value, on the ground of equitable estoppel. Cochran put these instruments, complete in every respect, except the name of the assignee, into the hands of

Williams, to be delivered to Snyder. They both knew that by delivering them they were putting it in his power to fill the blank, and then offer the instruments, thus completed, for sale to one to whom the instrument would give no notice whatever that they had ever been in the hands of Williams, or any other agent of Cochran, or of any conditions attached to their delivery, or of the fact that the assignment of the mortgage was originally in blank. Cochran thus clothed Woodman, whose name was inserted in the blank, with apparent perfect and absolute title to the notes and mortgage; and by so doing he is estopped from asserting the present defenses against one who purchased in good faith, for value, in reliance on these muniments of title. Wetmore was therefore entitled to be protected as a *bona fide* purchaser. This was decided on the former appeal, although the court, in there applying the doctrine of equitable estoppel, had more particularly in mind the alleged fraudulent representations of Snyder and Woodman as to the Ogby check. But the doctrine is equally applicable to the points more particularly urged on this appeal. Where a thing is sold for cash, but a check is accepted for the purchase money, and a delivery of the thing is made on the implied condition that the check will be paid on presentation, there are cases which hold that the vendor will not be estopped, as against a subvendee, by the fact that he gave a written acknowledgment of the payment of the purchase money; but we apprehend no case can be found which so holds, where the vendor gave an absolute bill of sale or assignment of the property, and the subvendee for value purchased on the faith of these muniments of title. Such was the fact in this case.

While the case has been very exhaustively argued by counsel, and numerous assignments of error made, it seems to us that what has been said covers all there is of substance in this appeal, and is decisive of the case.

The word "Seal" affixed by Woodman to his assignment of the mortgage to Fenderson, was a sufficient "device" by way of a seal to entitle the instrument to record.

Order affirmed.

BUCK, J., absent, sick, took no part.

(Opinion published 59 N. W. 543.)

LAURA A. COLBY vs. LIFE INDEMNITY & INVESTMENT CO.

Argued May 23, 1894. Reversed June 15, 1894.

No. 8765.

Unauthorized demand of assessment, may have misled the insured.

Held that, under the facts of this case, the jury would have been justified in finding that, by reason of certain misrepresentations and unauthorized acts of the defendant insurance company (especially in demanding of the insured payment of an assessment in addition to his premiums) the insured was misled and induced to refrain from paying the premiums which he otherwise would have paid.

This sufficient ground to have his policy reinstated on payment of all premiums due.

Held, also, that this would be sufficient ground to entitle the insured, if living, to have his policy reinstated, or, if dead, to entitle the beneficiary to recover on it upon payment of all premiums due.

Statements of an agent not within the scope of his agency.

Certain statements of an agent of the defendant *held* inadmissible, because not within the scope of his agency.

Erroneous instruction to jury.

An instruction to the jury that, if the assessment was illegal, this would be sufficient excuse for the nonpayment of premiums, *held* erroneous, because it omitted other facts essential to a valid excuse.

Appeal by defendant, the Life Indemnity and Investment Company, from an order of the District Court of Houston County, *Jno. Whytock, J.*, made February 6, 1894, denying its motion for a new trial.

Defendant is a corporation organized October 10, 1881, under the laws of Iowa and doing business at Waterloo in that state. On December 30, 1882, Herman Colby took out a certificate of membership in the company for the sum of \$2,500. This certificate constituted him a member and entitled his wife, Laura A. Colby, if death occurred within ten years to the proceeds of one full assessment not to exceed \$2,500, and if he lived to the end of the period, entitled him to \$1,000 from the surplus funds of the company upon the surrender of his certificate of membership, or if there was not sufficient in the surplus fund as apportioned then to a two-fifths assess-

ment upon the members in his class, together with his share of the surplus fund as apportioned, in all not exceeding \$1,000. He paid the assessments required of him until November 10, 1886, when by a new contract between them it was provided that instead of receiving the proceeds of one full assessment not to exceed \$2,500, the assured should receive, regardless of what an assessment might bring, the full sum of \$2,500, and provided in lieu of assessments that the assured should pay a specific sum as a premium on the first day of each and every month during any continuance of the insurance and provided that the policy should lapse *ipso facto* on the nonpayment of this premium, with a condition however for reinstatement at any time within the period of sixty days upon certain conditions. This contract was complied with by the insured up to and including August 1, 1891. He then ceased to pay his regular premiums and did not thereafter pay anything on the contract. He died January 29, 1892.

The widow brought this action to recover the \$2,500. The company defended on the ground that the policy had lapsed for nonpayment of premiums. At the trial she obtained a verdict for that sum with interest. Defendant moved for a new trial. Being denied it appeals.

Wilson & Quick, and Harries & Duxbury, for appellant.

The plaintiff's theory of this case seems to be, first, that the company made an illegal assessment upon her deceased husband, and, second, that the illegal assessment constituted an excuse for the nonpayment of the regular premiums provided for in the contract of insurance. Conceding that the assessment was illegal and that it was made with the fraudulent intent of driving out weak and sickly members, it was no excuse for the nonpayment of the regular valid premium due on the policy on the first day of every month. It was no excuse for the nonpayment of the premium due September 1, 1891, provided for in the policy, for the reason that the assured was bound to know the law of his contract. *Aetna Ins. Co. v. Reed*, 33 Ohio St. 283; *Fulton v. Hood*, 34 Pa. St. 365; *Mayhew v. Phoenix Ins. Co.*, 23 Mich. 105; *Goss v. Peters*, 98 Mich. 112; *Perkins v. Trinka*, 30 Minn. 241; *Hall v. Wheeler*, 37 Minn. 522; *Erkins v. Nicolin*, 39 Minn. 461; *Town of Rochester v. Alfred Bank*, 13

Wis. 432; *Neff v. Rains*, 33 Wis. 689; *Kenyon v. Welty*, 20 Cal. 637.

The contract of life insurance is unilateral in form. The company only is bound. To bind them the premium must be paid at the time stated in the contract, and time is the essence of the contract. *Mandego v. Centennial Mut. L. Ass'n*, 64 Ia. 134; *Madeira v. Merchants Exch. Mut. Ben. Soc.*, 16 Fed. Rep. 749; *Klein v. Insurance Co.*, 104 U. S. 88.

The Judge in attempting to direct the jury as to what would constitute an excuse for the nonpayment of the premiums, gave them instructions which were inconsistent, contradictory and liable to mislead, and for which the verdict cannot stand. *McCormick v. Kelly*, 28 Minn. 135; *Aetna Ins. Co. v. Reed*, 33 Ohio St. 283.

E. H. Smalley, for respondent.

A general exception to the whole of the charge of the court and to each part of it is insufficient. *Caldwell v. Murphy*, 11 N. Y. 316; *Smith v. Coleman*, 77 Wis. 343.

The defendant's exceptions were not properly taken. *Russell v. St. Paul, M. & M. Ry. Co.*, 33 Minn. 210; *Rheiner v. Stillwater St. Ry. & T. Co.*, 31 Minn. 193; *Rosquist v. Gilmore Furniture Co.*, 50 Minn. 192; *Carroll v. Williston*, 44 Minn. 287; *State v. Miller*, 45 Minn. 521.

Where a defendant requests several distinct charges to the jury, some of which are given and others refused, a general exception to the refusal of the Judge to charge in accordance with the requests is insufficient. An exception must point out the specific matter complained of. *Edgell v. Francis*, 86 Mich. 232; *Racine B. M. Co. v. Koust*, 51 Wis. 256; *Shull v. Raymond*, 23 Minn. 66; *Pound v. Port Huron & S. W. Ry. Co.*, 54 Mich. 13; *Lund v. Anderson*, 42 Minn. 201.

The evidence tends to show a deliberate scheme on the part of the company to put Colby out. The jury had a right to infer that the acts of the company were deliberately fraudulent. Whether the company had bad faith or not is, however, immaterial as the acts of the company, whatever the motive, misled Colby to his serious prejudice. *Hartford L. & A. Ins. Co. v. Unsell*, 144 U. S. 439;

Beebe v. Wilkinson, 30 Minn. 548; *Continental Nat. Bank v. National Bank of the Comm.*, 50 N. Y. 575; *Blair v. Wait*, 69 N. Y. 113; *Wyman v. Gillett*, 54 Minn. 536; *Tiffany v. Henderson*, 55 Ia. 405; *Insurance Co. v. Eggleston*, 96 U. S. 572. If the crafty conditions with which insurance companies fence in the rights of the assured, and the subtle arguments which their counsel found upon them were always to prevail, these corporations would be reduced to the simple function of receiving premiums for little or no risk.

MITCHELL, J. The defendant was originally organized under the laws of Iowa, by the name of the Union Mutual Aid Society, as a life insurance and endowment company under the "assessment" plan. December 30, 1882, it issued to plaintiff's husband, Herman Colby, a certificate of membership. Having subsequently amended its constitution and by-laws so as to change it into a regular mutual life insurance company, on November 10, 1886, it issued to Colby the "supplementary" contract or policy.

This, of course, superseded the original certificate, at least in so far as the two were inconsistent. The latter is on its face a plain ordinary policy of life insurance for a stated period, with the privilege of indefinite renewal or continuance by payment of a specified monthly premium. In the absence of any modifying agreement, the effect of it would be to extinguish all the rights of Colby under the "endowment" clause in the original certificate, and to release him from all "special two-fifths assessments" or other liability except for the monthly premiums provided for in the new or supplementary contract.

The defendant seeks to modify or add to the terms of this contract by certain circulars sent to its members in November and December, 1886. These circulars explain the reasons of the company for making the change in their business, and in some particulars state its views as to the construction and effect of the new or supplementary contract. In case of ambiguity in the language of that contract, these circulars might perhaps be resorted to, to aid in its construction, but they constituted no part of the contract, and cannot vary its terms. But, even if they could be referred to for any such purpose, it is clear from their contents that, while they state that the "endowment feature" of the old certificates will

be carried out by the company, yet they over and over again assure those who will accept or have accepted the supplementary contract that they are thereby released from all liability except for the regular premium stipulated for in the new contract. This is the very essence of the reason given for making the change, and is utterly inconsistent with the idea that the holders of the supplementary contract would continue liable to special two-fifths assessments. If the company intended to continue its liability on the endowment clause in the old certificates, it must have contemplated liquidating it out of the proceeds of the regular premiums. If it did not mean this, it was perpetrating an intentional fraud. Hence, whatever might be the rights of certificate holders not accepting the new contract against their fellow members who did, we are clear that the company itself had no right to assess against the latter any special two-fifths assessments. Therefore it had no right to levy any such assessment against Colby after November 10, 1886.

Subsequent to November 10th, Colby continued to pay his regular monthly premiums, the company claiming nothing more until August, 1891, as hereinafter stated. In 1889, for some reasons not fully explained, but which may be readily surmised, the company endeavored to obtain from the holders of the old certificates a waiver or release of all rights under the special two-fifths assessment clause, and an agreement to accept in lieu thereof, when their certificates matured, their equitable proportion of the "surplus" fund accumulated while the certificates were in force. They sent to Colby for execution a blank waiver or release of this character, by the terms of which its acceptance by the company was optional, unless all other members holding like certificates would sign like releases, in which event its acceptance by the company became obligatory. January 7, 1889, Colby signed this release, and sent it to the company, which retained it in silence until June 15, 1891, when it returned it to him, with notice that it could not accept it, because some other certificate holders had refused to sign like releases. Shortly following this, on August 15, 1891, the company notified Colby that it had made a special two-fifths assessment against him, amounting to \$10.80, and payable in 30 days, to pay endowments on 18 certificates which had matured. On receipt of this notice, Colby, who had promptly paid all his premiums up to September 1, 1891, amounting in the

aggregate to several hundred dollars, apparently fearing that, if these assessments were to continue, it would be throwing money away to pay any more on his policy, and thinking he had better first find out where he stood, wrote to the company for information. The result proved that his fear was not unfounded, for on August 21st the president of the company replied, stating that there were over 700 certificates outstanding which matured before his, on which his assessment would amount to over \$425, while there were in force only 246 certificates liable to assessment for his benefit, so that the most he could possibly get on the endowment clause in his certificate would be about \$193. Colby, probably concluding from this showing that to continue to pay on his policy would be throwing money away (the correctness of which was proved by the fact that on September 15, 1891, the company made another assessment on him for \$15), omitted payment of the premium due September 1st, and never paid anything more on his policy. He made no tender of the premium due September 1st; neither was there any evidence that, if he had, the company would have refused to receive it. But there was evidence to justify the jury in finding that he honestly supposed that the company had a right to make this assessment, in which case the payment of the premium, without paying the assessment, would not have prevented a lapse of his policy, and that, but for the unauthorized act of the company in making the assessment, and their wrongful implied assertion of the right to make future ones, Colby would have continued to pay his regular monthly premiums.

In November or December, 1891, the company notified Colby that the two-fifths special assessment "had been set aside," and offered to reinstate his policy upon payment of back premiums, and "furnishing satisfactory evidence of good health." This evidence he was unable to furnish, because he was then seriously ill of the disease of which he died, in January, 1892. Of course, if Colby's failure to pay his premiums was his own fault, the company had a right to insist on this certificate of good health as a condition of reinstating his policy; but, if such failure was caused by the misrepresentation or other unlawful act of the company itself, it had no right to require such a certificate, or anything except the payment of the premiums. After Colby's death the plaintiff, the bene-

fiary of the policy, tendered payment of all back premiums due up to her husband's death, which the company refused to accept, insisting that the policy had lapsed by reason of the nonpayment of both the premiums and assessments.

From what has been said, it follows that the policy did not lapse because of the nonpayment of the assessments, and the only question is whether, under the facts, it lapsed because of the nonpayment of the premiums. The substance of defendant's contention is that the misrepresentation, if any, of the company, was not made with any fraudulent intention; also that it was at most a mere representation as to the law of the contract, which could not be a ground for relief; and also that the fact that the assessment was unauthorized furnished no excuse for the nonpayment of the premium.

It is not necessary that the misrepresentation should have been made with a fraudulent intent to deceive. It is enough if it was reasonably calculated to mislead, and did mislead, Colby to his prejudice.

It may be here added that, under the circumstances, a representation by the company that it had a right to make the assessment included, by necessary implication, a representation that it had a right to make future ones, and that, if these assessments were not paid, the policy would lapse, notwithstanding the payment of the premiums.

We recognize that the general rule is that, as between parties bearing no fiduciary relation to each other, a mere misrepresentation of law by one party, or a mere mistake of law by the other party, is no ground for relief. But it seems to us that, in view of all the facts, the acts of the company amounted to more than a mere misrepresentation of law. It originally organized its business on a plan financially vicious and unsound, and, in its subsequent efforts to change its base, its conduct was characterized throughout by a course of backing and filling and hedging that was well calculated to deceive and mislead men of ordinary intelligence, but not experts in the insurance business. Indeed, the company itself did not seem to know where it stood. The disparity of the parties must also be borne in mind. Ordinary men are not usually acquainted with all the intricacies of insurance contracts, while the insurer is presumed to be an expert on the subject; and it is a matter of common knowl-

edge that the insured are accustomed to rely largely on the insurer for information as to their rights and liabilities. The somewhat complicated history of the transaction did not present a simple legal proposition, familiar to the ordinary mind, but a complex question, involving an element of fact as well as of law, and about which mistake or misunderstanding might well be supposed to exist. The company had for years been representing to Colby, by both words and acts, that he was no longer liable on the special two-fifths assessment clause in his original certificate, and it was a fair inference that he had paid his premiums on the faith of this representation. The act of the company in making an assessment against him in August, 1891, amounted to a representation that he still remained liable under the clause referred to. The reason for this change of front was not stated. Colby might have supposed that it was for some cause not appearing on the face of the policy; as, for example, the inability of the company to induce some of the old certificate holders to come into the new arrangement. But, even if the misrepresentation be deemed to have been merely as to the law of the contract, still it seems to us that the relation of the parties was such as to render the misrepresentation a ground for relief to the extent of preventing a forfeiture. While the company (a mutual one), as a corporate entity, and its members, were, in one aspect of the case, opposite contracting parties, yet, in another aspect, they occupied a sort of fiduciary relation to each other, somewhat analogous to that of principal and agent, or trustee and cestui que trust; and it is a familiar principle that, when the contracting parties bear a fiduciary relation to each other, a misrepresentation as to the law of the contract may be a ground for relief.

If Colby knew that the assessment was illegal, the act of the company in making it would not be sufficient excuse for his not paying or tendering his premium; but if, by the misrepresentation of the company, he was led to honestly and reasonably believe that the assessment was valid, and that he would have to pay it, as well as his premiums, to keep his policy from lapsing, and he was thereby caused to refrain from paying the premium, which he otherwise would have paid, as the jury might have found, this would constitute a valid excuse. Our view is that, if the facts were as we have indicated, Colby, if living, would have been entitled to a reinstatement

of his policy on payment of all premiums due; and, if this is so, it would seem to follow that plaintiff, as the beneficiary of the policy, would be entitled to recover the amount of it, less these premiums. There was evidence to justify the verdict, and it would have to stand but for errors of law occurring at the trial.

We have not considered all the exceptions to the admission of evidence, as most of them were either not well taken, or the alleged errors not such as are likely to occur again; but, with a view to another trial, we would say that the evidence as to what the witness Field stated to Colby ought not to have been admitted, because it does not appear that such statements were within the scope of Field's agency.

The most serious error, however, was in the manner of submitting the case to the jury. As a whole, the charge of the court was rather obscure, on some points inconsistent, and not well calculated to inform the jury what the precise issues were, or by what rules of law they were to be guided in passing upon them. But the most grave error was by giving plaintiff's fourth request. Stripped of all verbiage, the effect of this was to instruct the jury that, if the special two-fifths assessment was illegal, this was sufficient excuse for Colby's not paying his premium. This was altogether too broad. It excluded the very facts which were essential to plaintiff's right to recover, to wit: That Colby was led by this act of the company to honestly and reasonably believe that the assessment was legal; and that he would have to pay it, as well as the premium, in order to continue his policy; and that he was thereby induced to refrain from paying his premium, which he otherwise would have paid. There is nothing elsewhere in the charge that corrected this error.

Order reversed.

(Opinion published 59 N. W. 589.)

JAMES R. HAND vs. NATIONAL LIVE-STOCK INS. CO.

Submitted on briefs May 31, 1894. Affirmed June 15, 1894.

No. 8771.

57 519
68 84

Objection to evidence waived.

The complaint alleged performance of the conditions of the policy of insurance. The evidence was that one of the conditions had been waived. *Held* that, under the facts of this case, the variance was waived by permitting substantially all of the evidence to be introduced without objection.

Objection first raised in this court.

Where it is apparent from the pleadings and the proceedings on the trial that both parties assumed that the policy was a valued one, and that there was no issue as to the value of the subject of the insurance, the appellant cannot raise in this court the point that there was no evidence of value.

An absolute refusal of all liability waives the right to delay of payment.

An absolute denial of all liability on a policy of insurance, and a refusal to pay, are a waiver of the right of the insurer to have a stipulated time after proofs of loss in which to pay.

Appeal by defendant, the National Live Stock Insurance Company, from an order of the Municipal Court of the City of St. Paul, *H. W. Cory, J.*, made November 11, 1893, denying its motion for a new trial.

On March 27, 1893, defendant insured one Charles Dewitt to the amount of \$100 for one year against loss by death of his sorrel gelding horse seven years old named Jeff valued at \$125. The loss if any was payable, ninety days after proofs thereof, to the plaintiff, James R. Hand, mortgagee, as his interest might appear. The policy provides that no animal shall be insured for more than two-thirds its value. The horse died May 8, 1893. No proofs of the death were made. Defendant denied any liability. This action was commenced July 7, 1893, in Justice Court to recover the \$100. Plaintiff had judgment for that sum and the defendant appealed on questions of law and fact to the Municipal Court. The issues were there tried August 11, 1893, by the court without a jury. The

defense was based upon the grounds, (1st) that no proofs of loss were ever furnished as required by the policy and no waiver of that condition was pleaded. (2nd) That this action was begun prematurely. (3rd) That there was no proof of the value of the horse.

The court made findings and ordered judgment for plaintiff for \$83.33. Defendant moved for a new trial, but was refused and appeals from the order.

Young & Lightner, for appellant.

In order to recover in this action plaintiff must allege and prove that he has furnished to defendant a particular account and proof of loss as required by the policy, or that the same has been waived. There is no allegation of waiver. Proof of waiver is not admissible under an allegation of performance. The complaint sets forth the policy at length and alleges performance of its conditions. The answer denies the allegation of performance and alleges that no proofs of loss were ever made or delivered to defendant. *Bowlin v. Hekla Fire Ins. Co.*, 36 Minn. 433; *Shapiro v. Western Home Ins. Co.*, 51 Minn. 239.

In pleading the performance of conditions precedent in a contract it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation is controverted the party pleading is bound to establish on the trial the facts showing such performance. 1878 G. S. ch. 66, § 109. Under such an allegation of performance of conditions precedent evidence of waiver or excuse for nonperformance is not admissible. *Oakley v. Morton*, 11 N. Y. 25; *Phenix Ins. Co. v. Bachelder*, 32 Neb. 490; *Evans v. Queen Ins. Co.*, 5 Ind. App. 198; *Hatch v. Coddington*, 32 Minn. 92; *Trainor v. Worman*, 34 Minn. 237; *Boon v. State Ins. Co.*, 37 Minn. 426; *Mosness v. German Am. Ins. Co.*, 50 Minn. 341; *Voak v. National Invest. Co.*, 51 Minn. 450.

It may be claimed that the allegation in the complaint, "That at divers times before the commencement of this action said plaintiff duly demanded from said defendant the payment of said loss, that said defendant disclaimed and denied any and all liability under said policy," is inferentially an allegation of waiver. But it is nowhere

stated that such denial of liability, if made, was within the fifteen days allowed the insured after loss in which to furnish proofs. That condition is as valid in respect to time as in other respects. *Bowlin v. Hekla Fire Ins. Co.*, 36 Minn. 433; *Shapiro v. Western Home Ins. Co.*, 51 Minn. 239; *Underwood v. Farmers' J. S. I. Co.*, 57 N. Y. 500.

The company did not deny liability until June 20, almost a month after the expiration of the fifteen days. Defendant's refusal to pay may have been based upon plaintiff's failure to furnish proofs of loss within the stipulated time. And in any event no inference of waiver can be drawn from this allegation when complete performance is distinctly averred.

The action was premature. The policy provides that any loss is to be paid ninety days after proofs of the same have been received by the company. At the close of plaintiff's case defendant moved to dismiss the action upon the ground that the suit was brought too soon. The motion was denied and defendant excepted; *Doyle v. Phoenix Ins. Co.*, 44 Cal. 264; *Cowan v. Phoenix Ins. Co.*, 78 Cal. 181; *Carberry v. German Ins. Co.*, 51 Wis. 605.

There is no evidence of the value of the horse. No animal could be insured for more than two-thirds its value, and whenever in case of loss the insurance shall be found to be greater the company shall be liable for no more than this proportion. Unless the policy in suit is what is termed a valued policy the insured must prove damage; *Maxcy v. New Hampshire F. Ins. Co.*, 54 Minn. 272.

The horse is thus described in the policy: "Kind of stock, gelding; name, Jeff; color, sorrel; age, seven; sum insured, \$100; valuation, \$125." This is the only reference in the whole case to the value of the horse and fails to prove the value of the horse at the time of its death. The clause in the policy providing for arbitration if differences shall arise between the parties as to the amount of any loss, conclusively shows that the valuation named in the policy is not to be taken as the agreed value in case of loss; consequently, this is not a valued policy. *Blinn v. Dresden Mut. F. Ins. Co.*, 85 Me. 389; *Brown v. Quincy Mut. F. Ins. Co.*, 105 Mass. 396; *Huckins v. People's Mut. F. Ins. Co.*, 31 N. H. 238.

Henry & R. L. Johns, for respondent.

The issues were joined in the Justice Court where the same nicety and precision in pleading are not required as in courts of record. Evidence will be received under pleadings joined in the former which would not be received under pleadings joined in the latter. A liberal practice should obtain in causes before Justices of the Peace, and whenever such causes come to the higher court the attainment of justice should be regarded as paramount to a strict adherence to the rigid technicalities of courts of record. Whenever the appellate court can infer that the merits have been fairly tried, it will not test the pleadings by technical rules. 1878 G. S. ch. 65, § 34. *Musier v. Trumpbour*, 5 Wend. 274; *Stuart v. Close*, 1 Wend. 438; *Kline v. Husted*, 3 Caine 275; *McGrath v. O'Brien*, 42 Minn. 13.

In the Justice Court no reply is necessary unless the answer sets up a counterclaim by way of setoff. Defendant pleaded that no proof of loss was ever made. Every proper and legal defense to this allegation is admissible in evidence as fully as if pleaded in a reply. Where an answer sets up a want of proofs of loss a waiver of this requirement of the policy is properly pleaded in the reply. *Jacobs v. St. Paul F. & M. Ins. Co.*, 86 Ia. 145.

Even in courts of record there is authority that, under an allegation of performance of a condition, proof of waiver is admissible without alleging the waiver. *May Insurance*, § 589; *Levy v. Peabody Ins. Co.*, 10 W. Va. 560; *Pennsylvania F. Ins. Co. v. Dougherty*, 102 Pa. St. 568; *West Rockingham M. F. Ins. Co. v. Sheets*, 26 Gratt. 854; *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Maddox v. German Ins. Co.*, 39 Mo. App. 198; *Russell v. State Ins. Co.*, 55 Mo. 585; *Schultz v. Merchants Ins. Co.*, 57 Mo. 331; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 108; *German F. Ins. Co. v. Grunert*, 112 Ill. 68; *Butterworth v. Western A. Co.*, 132 Mass. 489; *Daul v. Fireman's Ins. Co.*, 35 La. Ann. 98.

The doctrine of waiver in this regard is substantially that of an estoppel *in pais*, and need not be specially pleaded. *Coleman v. Pearce*, 26 Minn. 123; *Caldwell v. Augur*, 4 Minn. 217.

Defendant admits in its answer that it denied liability for the loss.

This denial was not based upon the absence of proofs of loss but because a part of the premium was due and unpaid at the time of the loss, and also that the loss was caused by negligence on the part of the assured. Where the company unqualifiedly refuses payment or refuses on grounds distinct from that of full notice and proof of loss it is presumed to have waived the absence of notice or proof of loss. Evidence that defendant refused to pay the loss because part of the premium was unpaid was certainly admissible under the pleadings, and no other proof of waiver was necessary, and hence the admission of evidence as to an express waiver, if error at all, was error without prejudice. *Francis v. Ocean Ins. Co.*, 6 Cow. 404; *Vos v. Robinson*, 9 Johns. 192; *Dietz v. Providence W. Ins. Co.*, 33 W. Va. 526; *Coryeon v. Providence W. Ins. Co.*, 79 Mich. 187; *German F. Ins. Co. v. Gueck*, 130 Ill. 345; *Sheanon v. Pacific Mut. L. Ins. Co.*, 83 Wis. 507; *Anthony v. German Am. Ins. Co.*, 48 Mo. App. 65; *Steamship Samana Co. v. Hall*, 55 Fed. Rep. 663; *Searle v. Dwelling House Ins. Co.*, 152 Mass. 263; *Phenix Ins. Co. v. Bachelder*, 32 Neb. 490.

The company is estopped to defend upon any but the original ground stated to assured as reason for not paying. *Toule v. Ionia E. & B. F. M. F. Ins. Co.*, 91 Mich. 219; *Western & A. Pipe Lines v. Home Ins. Co.*, 145 Pa. St. 346.

The action was not premature. It was not brought until after the company refused to pay the loss. When a company refuses to pay loss, action may be brought at once. *Aetna Ins. Co. v. Maguire*, 51 Ill. 342; *Williamsburg City F. Ins. Co. v. Cary*, 83 Ill. 453; *Hofecker v. New Castle Co. Mut. Ins. Co.*, 5 Del. 101; *Merritt v. Cotton State L. Ins. Co.*, 55 Ga. 103; *State Ins. Co. v. Maackens*, 38 N. J. Law 564; *Clover v. Greenwich Ins. Co.*, 101 N. Y. 277; *Georgia Home Ins. Co. v. Jacobs*, 56 Tex. 366.

There was no controversy at the trial as to the value of the property. The valuation was agreed upon by the terms of the policy and no attempt was made by the defendant to show that the property had depreciated in value since the insurance was effected. *Perry v. Mechanics Mut. Ins. Co.*, 11 Fed. Rep. 485; *Revere F. Ins. Co. v. Chamberlin*, 56 Ia. 508; *Siltz v. Hawkeye Ins. Co.*, 71 Ia. 710.

MITCHELL, J. The terms of the policy sued on were that defendant insured one Dewitt (loss payable to plaintiff as his mortgage interests might appear) against loss by death to the amount of \$100, on the following live-stock, to wit: "Kind of stock, gelding; name, Jeff; color, sorrel; age, seven; sum insured, \$100; valuation, \$125."

The policy provided that the property was insured against loss by death "not exceeding in amount the sum insured, and to be paid ninety days after proofs of the same have been made by the insured and received by the company."

It further provided that "no animal shall be insured for more than two-thirds its cash market value; and whenever, in case of loss, the insurance shall have been found greater, the company shall be liable for no more than this proportion."

The policy also contained a stipulation that, if differences should arise between the parties "as to the amount of any loss," the matter should, at the request of either party, be submitted to two appraisers,—one to be selected by each party.

1. The plaintiff in his complaint set out the policy, and alleged, generally, performance on his part of all its terms and conditions. On the trial he admitted that he had never furnished proofs of loss, but introduced evidence tending to prove that the defendant had waived them. The admission of this evidence is assigned as error, on the ground that no waiver was pleaded.

Many of the authorities in this country hold that in actions on insurance contracts, under an allegation of performance of a condition precedent, proof of a waiver is admissible. This is certainly not in accord with the spirit of the reformed system of pleading. The general rule, often applied by this court, is well settled that, under an allegation of performance of conditions precedent, evidence of waiver or excuse for nonperformance is not admissible. *Hatch v. Coddington*, 32 Minn. 92, (19 N. W. 393;); *Trainor v. Worman*, 34 Minn. 237, (25 N. W. 401;); *Boon v. State Insurance Co.*, 37 Minn. 426, (34 N. W. 902;); *Mosness v. German-American Ins. Co.*, 50 Minn. 341, (52 N. W. 932;); *Voak v. National Investment Co.*, 51 Minn. 450, (53 N. W. 708); and it is quite difficult on principle to see why the rules of pleading in actions on insurance contracts should be different from those applied in actions on other contracts. If there be any reasons for a distinction, they must be founded on considerations of policy.

But it is not necessary to decide the question in this case. Substantially all the evidence of waiver was admitted without objection. Only in the case of one witness was any objection interposed, and then only after practically all of his testimony that was material had been given. The evidence admitted without objection was such as to require a finding that there had been a waiver. It was not contradicted, and there was no suggestion that defendant was prejudiced by being taken by surprise.

2. It is not necessary to decide whether this was a valued or an open policy. It is evident from the pleadings, the proceedings on the trial, and the findings of the court that it was assumed throughout that the policy was a valued one, and that there was no issue as to the value of the subject of the insurance. This being the case, the defendant cannot now raise the point that there was no evidence of value.

3. This action was commenced within 90 days after the loss, and it is claimed that it was prematurely brought. Stipulations in policies of insurance that the loss is to be paid within a specified time after proofs of loss are furnished are not, strictly speaking, intended to fix the "due day" of the contract, but are inserted to enable the insurer, before making payment, to inquire and investigate with a view to determine whether he will pay. Hence it is well settled that a denial of all liability on a policy, and a peremptory refusal to pay under any circumstances, is a waiver of the right of the company to have the stipulated time before any suit is commenced. Upon such denial of liability and refusal to pay, an action may be commenced at once. The answer in this case admits that, before the commencement of this action, the plaintiff demanded from defendant payment of the loss, and that the defendant "denied any liability for said loss under said policy;" and, if necessary to resort to the evidence, it is sufficient to justify the finding to that effect. Order affirmed.

COLLINS and BUCK, JJ., absent, took no part.

(Opinion published 52 N. W. 538.)

STATE *ex rel.* vs. MINNETONKA VILLAGE *et al.*

Argued May 29, 1894. Decided June 15, 1894.

No. 8761.

"Lands adjacent" in Laws 1885, ch. 145, defined.

"Any district, sections or parts of sections which has been platted into lots and blocks, also the lands adjacent thereto * * * said territory containing a resident population of not less than 175, may become incorporated as a village." Laws 1885, ch. 145. *Held*, that "lands adjacent thereto" include only those which lie so near the center or nucleus of population on the platted lands as to be somewhat suburban in their character, and to have some community of interest with the platted portion in the maintenance of a village government. The act does not authorize the incorporation of large tracts of rural territory having no natural connection with any village and no adaptability to village purposes.

Writ of ouster ordered.

Ordered that a writ of ouster issue.

Information filed in this Court March 14, 1894, by H. W. Childs, Attorney General, stating that more than thirty persons resident in the limits of a proposed village, presented to the Board of County Commissioners of Hennepin County, March 19, 1892, their petition under Laws 1885, ch. 145, as amended by Laws 1887, ch. 62, asking the Board to appoint a time and place for the electors to vote for, or against, the incorporation of the territory as a village, to be named Minnetonka. The proposed village was about seven miles long in the longest part from east to west and six miles wide from north to south at the widest part and contained over thirty square miles. The Board appointed April 26, 1892, at the Hall over the Post Office in Minnetonka Mills as the time and place for the election. There were 110 votes cast for, and 52 against, incorporation. An election of village officers was afterwards held and the persons elected have since exercised the powers of such officers. The information charged that the Laws of 1885 ch. 145, is invalid because (1st) it does not define the amount of land that may be included in such a village nor delegate this power to any subordinate officer, and (2nd) the act if valid, does not authorize the incorporation of such an amount of unoccupied rural territory as a village.

A writ of *quo warranto* was issued returnable April 3, 1894, requiring the village officers to show by what warrant they exercise the powers and franchise of such officers. They made answer stating the steps taken to incorporate under the Act. The relator replied. Andrew H. Adams was appointed referee and took the evidence offered by each party and reported the same to this court.

H. W. Childs, Attorney General, *Chas. E. Vanderberg*, *A. D. Smith* and *Rea, Hubachek & Healy*, for the State.

The Act of 1885 providing for the incorporation of villages is unconstitutional for the following reasons: 1st. Because it delegates legislative functions to thirty electors, private citizens, residing upon the lands to be incorporated. 2nd. Because it is in violation of Article III of the Constitution, distributing the powers of government. 3rd. Because it violates Article 9, § 1. 4th. Because it violates Article 1, §§ 7, 13.

A village is a political subdivision of the State, a municipal corporation, the creation of which has been entrusted by the people to the legislature only. *State ex rel. v. Simons*, 32 Minn. 540; *State ex rel. v. Young*, 29 Minn. 474; *Shumway v. Bennett*, 29 Mich. 451. In the Act of 1885 no single fact or thing is stated upon the existence of which the corporation is made to depend, except that the territory named must contain 175 residents. The exercise of all the important legislative functions in the formation of the village is delegated to thirty private persons.

The States which have laws similar in some respects to our own, define in some way what extent of territory may be taken. In Michigan it must not be more than one square mile. Howells Annotated Stat. § 2983. In New York, if it contain more than one square mile, it must have a population of not less than three hundred upon each and every additional square mile. Laws 1847, ch. 426. In Ohio the County Commissioners have the power to determine the extent of territory, that it is not too large nor too small. Rev. Stat. (Williams) pp. 318, 319. In Pennsylvania the Court shall exclude farming lands, if they have been included within the proposed village (borough). Brightly's Purdon's Digest p. 165. In Illinois only two square miles may be taken. Starr & Curtis Annotated Stat. p. 510. In Wisconsin, if the area is more than one half square mile

it must contain a population of at least four hundred persons upon every additional square mile. Sanborn & B. Annotated Stat. p. 503. In all these and other states, additional facts and safeguards are prescribed by the law; the census must show the name of each head of a family and the number of persons in the family; a day is set for hearing all parties, and an opportunity is presented at each stage of the proceedings when and where parties may be heard pro and con.

We claim that the incorporation of the respondent village was illegal and void. 1st. Because in all the immense tract of territory defined in this petition, there did not and still does not exist "any district, sections or parts of sections which has been platted into lots and blocks, also the lands adjacent thereto,—said territory containing a resident population of not less than 175" persons. 2d. Because the plats named in said petition are each separate and distinct from every other one, in some cases by many miles of wild and farm lands. 3d. Because there is no nucleus with which to start a village and such as the law contemplates for the formation of a village. 4th. Because the vast area and extent of lands absorbed by this village are not adjacent to the platted lands or to any of them. Our chief contentions are that the unplatted lands are not adjacent to the platted lands, and that there is no one body of platted lands which, with the lands adjacent thereto, contains a resident population of 175 persons. *Illinois Cent. Ry. Co. v. Williams*, 27 Ill. 48; *Toledo, W. & W. Ry. Co. v. Spangler*, 71 Ill. 568; *Smith v. Sherry*, 50 Wis. 210; *People v. Schermerhorn*, 19 Barb. 540; *Continental Imp. Co. v. Phelps*, 47 Mich. 299.

Where the State is proceeding against a *de facto* municipal corporation by *quo warranto*, and the respondent admits that it is exercising a municipal franchise, and claims the right to do so, the burden rests upon it to show a grant of power, and that it has brought itself within the prescribed legislative conditions. It must show that it is legally established as well as organized. *State ex rel. v. Parker*, 25 Minn. 215; *State ex rel. v. Sharp*, 27 Minn. 88; *State ex rel. v. Reynolds*, 61 Mo. 203; *Smith v. Board of Co. Comrs.*, 45 Fed. Rep. 727.

The word "adjacent" in the statute is used in the sense of contiguous and adjoining. Remote lands having no natural adaptability

to village purposes can not lawfully be included. And where actual unity of interest is impracticable, legal unity should not be attempted, but the incongruous communities should be left to independent control. *Vestal v. Little Rock*, 54 Ark. 321; *State ex rel. v. Eidson*, 76 Tex. 302; *Ewing v. State*, 81 Tex. 172; *Page v. Board of Supervisors*, 85 Cal. 50; *People v. City of Riverside*, 66 Cal. 288; *State v. Town of Baird*, 79 Tex. 68.

Young, Fish & Dickinson and Hale, Morgan & Montgomery, for respondents.

This Act has been before the court upon various points, in the following cases; *State ex rel. v. Cornwall*, 35 Minn. 176; *State ex rel. v. Spaude*, 37 Minn. 322; *Bradish v. Lucken*, 38 Minn. 186; *Stemper v. Higgins*, 38 Minn. 222; *Baldwin v. Robinson*, 39 Minn. 244; *Bradley v. Village of West Duluth*, 45 Minn. 4; *Village of St. James v. Hingtgen*, 47 Minn. 521; *Village of Wayzata v. Great Northern Ry. Co.*, 50 Minn. 438; *Village of Buffalo v. Harling*, 50 Minn. 551.

Considering these frequent interpretations, the extent of such litigation, and the very large number of villages now existing under the Act, it would, at this late day, be as surprising as disastrous to destroy the legislative foundation upon which all such villages stand. But the weight of the constitutional attack is not alarming. The Legislature, in the exercise of its undoubted power to create village corporations, may leave it to the people immediately concerned, and to the local authorities, to determine for themselves, under specified conditions and on proper terms, whether or not territory of their selection shall be formed into such corporation. *State ex rel. v. District Court of Hennepin Co.*, 33 Minn. 235; *State v. Cooke*, 24 Minn. 247.

The objection chiefly argued is that the statute does not authorize the inclusion within village limits of so large a territory, nor the kind of territory embraced in this case. The fallacy of relator's argument is that each case is for the Courts to decide. That if the Judges are convinced that too much land had been included, or too much of a given kind of land, then the incorporation is void, otherwise it is valid. This is the very mistake that invalidated

Laws 1883 ch. 73, and which the present law was designed to correct. *State ex rel. v. Simons*, 32 Minn. 540. In *Shumway v. Bennett*, 29 Mich. 451, it is said; "The propriety of the shape or boundaries of the proposed village is often the principal thing deemed necessary to be settled by the legislature, when it submits a charter to the popular vote." Yet counsel insists that under this act, conceding it to be valid, the court is at liberty to review and overrule the action of the constituted authorities upon this very "principal thing." It is claimed in this case that the area incorporated, considering its character and occupancy, is far in excess of that contemplated by the statute. Now, suppose the commissioners had been of the same opinion, and for that reason had refused to post notices for the requested election, would the court have compelled them to do so by mandamus? If so, the relator has no case here: for in so doing, the Court must hold that the case made by the petition is within the statute. On the contrary, a refusal of the Court to grant the writ, would be equally fatal, for such refusal must rest upon the ground that the commissioners were at liberty to accept or reject in their discretion. There can be no reasonable doubt that the purpose of this Act is to leave the matter to the people immediately concerned, subject to the approval of the Board of County Commissioners. That body has general charge of county affairs. Its members are chosen for the express purpose of superintending public business of this character. They regulate the organization, boundaries, division and consolidation of towns and school districts, and in general, they represent the legislative function as applied to the details of county business. There is manifest propriety in giving to them the power to prevent the incorporation of territory which, in view of all the interests involved, ought not to be incorporated. Accordingly this Act provides that no incorporation shall be effected excepting upon petition to them; and the very term "petition" implies the power to grant or to refuse the thing prayed for.

The only substantial point made against the regularity of the proceedings is, that a large part of the area of this village is not properly urban territory; that it is farming or wild land, and is too remote from the platted nucleus of Minnetonka to be in any way tributary thereto or associated therewith. If the Legislature had

seen fit by a direct act to incorporate the same territory as a village with the same powers conferred by this general law, the courts would not have interfered. The opinion of the Legislature upon the subject would not have been open to judicial revision. The term "adjacent" as here used was not intended to prescribe any definite limit. It means such adjacent lands as the conditions of the particular case, in the exercise of a reasonable discretion, may indicate. What would be a reasonable area in one case might be too large or too small in another. The discretion to be exercised is confided, not to the Courts, but to the people immediately concerned, and to the County Commissioners as representing the local public generally.

The decision of the County Commissioners in the first instance, that the petition in question conforms to the statute, as such finding is involved in their favorable action upon it, and the decision of the voters within the district to incorporate, followed by the completion of the village organization and the election of village officers, pursuant to the statute, and the subsequent exercise by respondents of the powers thus conferred until this time, is binding upon this court. *City of Galesburg v. Hawkinson*, 75 Ill. 152.

MITCHELL, J. It is conceded that the respondent exists, if at all, by virtue of the petition and other exhibits attached to the information, and purporting to be proceedings under Laws 1885, ch. 145, entitled "An act to provide for the incorporation of villages," etc.

The language of the statute is: "Any district, sections or parts of sections which has been platted into lots and blocks, also the lands adjacent thereto, * * * said territory containing a resident population of not less than 175, may become incorporated as a village."

The territory claimed to have been incorporated as the village of Minnetonka lies between the western boundary of the city of Minneapolis and the eastern shore of Lake Minnetonka, and contains nearly thirty square miles, being nearly equal in area to a full government township. Within this territory there were, at the time of its alleged incorporation, seventeen or more tracts which had been platted, into lots and blocks, but these were in no way connected, but were separated, each from the other, by quite an extent of farm

or uncultivated lands; and one peculiarity of the petition is that it does not indicate which of these numerous plats was to be the nucleus of the proposed village. Many of these platted tracts are entirely vacant and uninhabited, and on most of the others there are only a very few permanent inhabitants, not sufficient to constitute a "village," in the popular and ordinary sense of the word. The only one which has inhabitants enough to constitute any considerable nucleus of either business or population is "Minnetonka Mills," situated on section 15. This contains about 20 families, and a population variously estimated from 60 to 105, and, together with the whole of sections 14 and 15, contains a population of only about 120. There are several post offices, and as many as eight railway stations, within the boundaries of the alleged village. There is a considerable number of summer cottages and boarding houses along the shore of Lake Minnetonka, but these are mainly occupied by temporary summer visitors, who have no business or other relations with "Minnetonka Mills" during their sojourn. The northwesterly part of the territory is naturally tributary to the considerable village of Wayzata, situated just outside of the respondent village; while the southeasterly portion is in like manner tributary to the village of West Minneapolis, just outside its east boundary. There are twenty three sections, within the boundaries of the corporation, which contain neither platted lands nor collections of houses in the nature of villages. The greater part of the resident population is strictly rural or agricultural, and the greater part of its territory consists of either wild lands or cultivated farms, of which there are about 150.

It is apparent that this large territory, essentially rural, has no fitness for village government, and absolutely no community of interest in respect to the purposes for which such a government is designed.

The validity of respondent's incorporation is assailed on the grounds (1) that the act is unconstitutional; (2) that the act does not authorize the incorporation of such territory into a village.

The point made against the validity of the act is that the legislature has neither itself determined how much or what character of land shall be included in a village, nor delegated the power to do

so to any proper subordinate official body, but has left it wholly to the arbitrary determination of any thirty private citizens who may sign the petition, subject only to the conditions that the territory contains a population of 175, and that there be somewhere within its boundaries a tract of land platted into lots and blocks, and that the majority of the electors, within the territory whose boundaries are thus arbitrarily fixed by the petitioners, vote in favor of incorporation.

It would be difficult to sustain the act if the word "adjacent," as used in the third section, is to be given the meaning contended for by the respondent, for under such a construction it would be left to the petitioners, subject only to the above limitations, to arbitrarily determine how much and what character of territory should be included in the proposed village. They might include a rural territory 50 or 100 miles square, provided "they did not skip over any as they advanced." But clearly this was not the intention of the legislature.

The purpose evidently was to authorize the incorporation of "villages," in the ordinary and popular sense, and not to clothe large rural districts with extended municipal powers, or subject them to special municipal taxation for purposes for which they were wholly unsuited.

A "village" means an assemblage of houses, less than a town or city, but nevertheless urban or semiurban in its character; and the object of the law was to give these aggregations of people in a comparatively small territory greater powers of self-government and of enacting police regulations than are given to rural communities under the township laws. The law evidently contemplates, as a fundamental condition to a village organization, a compact center or nucleus of population on platted lands; and, in view of the expressed purposes of the act, it is also clear that by the term "lands adjacent thereto" is meant only those lands lying so near and in such close proximity to the platted portion as to be suburban in their character, and to have some unity of interest with the platted portion in the maintenance of a village government. It was never designed that remote territory, having no natural connection with the village, and no adaptability to village purposes, should be included.

Whether the word "adjacent" is to be given a more limited and definite meaning of universal application, or whether, as is my own impression, there is no inflexible rule, except the general one already laid down, as to what lands are adjacent, and that each case will depend somewhat on its own particular facts, it is not necessary to consider in the present case. There is no difficulty in determining, as a matter of law, that this territory is not "adjacent," within any meaning of the word, and that its attempted incorporation into a village was wholly unauthorized by the act.

Let a writ of ouster issue.

BUCK and CANTY, JJ., took no part.

(Opinion published 59 N. W. 973.)

WM. W. CARGILL *et al.* vs. EDWARD THOMPSON *et al.*

Argued April 30, 1894. Reversed June 22, 1894.

No. 8714.

A mortgagee in possession is not in privity with a lessee.

A mortgagee in possession of real estate has not an estate which brings him in privity with the lessee under a lease executed by the mortgagor, so as to make him liable to the lessee upon the covenants in the lease.

Nor is the assignee of the rent if it be taken as security merely.

An assignee of rents growing out of a lease, assigned to him as security, has not such an estate.

Expert witness to meaning of a contract.

Where the construction of a contract is in question, it is error to allow a witness to state how he understands it, or any portion of it.

A contract construed.

A covenant in a lease to furnish a specified power of water, to be used in propelling a particular mill of the lessee, gives the lessee the right to the full power specified, though it be more than was necessary to run the mill as it was when the lease was executed. He may increase the capacity of the mill so as to use the specified power.

Care required to avert injury.

The rule requiring one exposed to injury through the default of another to use ordinary care and reasonable precaution to avert or lessen the

injury does not require of him to perform the duties in the premises belonging to such other.

Profits as damages.

Upon a breach of covenant to furnish a specified power of water to propel a mill used in manufacturing flour, the covenantee may recover, as damages, profits which he would have made in the manufacture of flour at the mill, but which he was prevented making by a breach of covenant.

Canty, J., dissenting.

Appeal by defendants Edward Thompson and Ara D. Sprague, from an order of the District Court of Houston County, *John Whytock*, J. made November 24, 1893, denying their motion for a new trial.

The plaintiffs, Wm. W. Cargill and Samuel D. Cargill, complained that defendant Thompson and wife, being the owners of a dam and water power at Hokah on Root River, on April 27, 1872, leased to White Bros. for twenty years, with right of renewal, the exclusive right to use therefrom 7,505 cubic feet of water per minute at a six foot head, they to pay \$500 yearly rent. That on April 8, 1879, Thompson and wife made another lease to White Bros. for the unexpired term, increasing the right to water to 10,000 cubic feet of water per minute under an eight foot head, they to pay an additional rent of \$10 per horsepower, making \$1,050 per year. That in these leases the Thompsons agreed to keep the dam reasonably tight and of sufficient height to produce a head of not less than eight feet of water at the flume of the mill and to construct and keep in repair the head race and clean it out from time to time, but did not warrant the supply of water in the river. That White Bros. on September 22, 1881, assigned both leases, and all their rights thereunder, to the plaintiffs. That on March 4, 1886, Thompson and wife conveyed the property to the defendant Sprague and assigned to him the rents, subject to the rights of the lessees, and that plaintiffs thereafter paid to him and he received the rent; that they used the water to propel their flouring mill at Hokah, known as the Crescent Mill; that the mill had a capacity of 250 bbls per day; that defendants failed to keep the dam at sufficient height and reasonably tight and in repair and failed to keep the head race clean, whereby they sustained great inconvenience and injury to their flouring business

and asked \$25,184 damages. The defendants demurred to this complaint but the demurrer was overruled and they appealed but the order was affirmed. *Cargill v. Thompson*, 50 Minn. 211. The action was then dismissed as to Orinda Thompson. The other defendants answered severally, stating among other things, that on the date of the conveyance to Sprague, he executed a defeasance to Edward Thompson providing that on his payment of \$16,841.26 then owing by him to Sprague, together with six per cent interest and all taxes and expenses he would reconvey to Thompson and reassign the right to the rents. They further answered that plaintiffs had put in new machinery and greatly increased the capacity of the mill and the quantity of water required to run it and that all obstructions in the head race were caused by plaintiff's improper manner of drawing water therefrom and allowing ice to accumulate therein. The plaintiffs replied and the issues were tried May 10, 1893. The plaintiffs had a verdict for \$7,500. Defendants moved for a new trial but were refused and they appeal.

Benton, Roberts & Brown, Wells & Hopp and E. H. Smalley, for appellants.

Sprague was simply a mortgagee, whose only interest in the property was for the purpose of securing the payment of the debt Thompson owed him. He was not liable for breach of covenants of the lease to plaintiffs. And this is true whether he was in possession of the property leased or not. There is no privity of contract between plaintiff and Sprague. The only ground on which Sprague can become liable for a breach of the covenants contained in a lease made by Thompson is, that he comes into an estate in, and title to, the lands themselves by reason of a transfer from Thompson. *Cargill v. Thompson*, 50 Minn. 211.

The only question then is, did Sprague, by his deeds and contracts with Thompson, become the purchaser of the land, or acquire a legal estate or title as owner. This deed in connection with the recorded defeasance and the unrecorded agreement which was expressly referred to in the recorded defeasance, constituted Sprague simply a mortgagee. *Holton v. Meighen*, 15 Minn. 69; *Everest v. Ferris*, 16 Minn. 26; *Benton v. Nicoll*, 24 Minn. 221; *Blakeley v. Le Duc*, 25

Minn. 448; *Butman v. James*, 34 Minn. 547; *Marshall v. Thompson*, 39 Minn. 137; *Brinkman v. Jones*, 44 Wis. 498; *Scott v. Mcwhirter*, 49 Iowa 487.

The only cases which can be cited holding a mortgagee liable on covenants in leases upon land conveyed in the mortgage are those from jurisdictions where the mortgagee is still regarded as holding the legal title to the lands. This rule of the mortgagee as owner, is the English common law doctrine and is still adhered to in England and in some American states. *Walton v. Cronly's Admr*, 14 Wend. 63; *Kortright v. Cady*, 21 N. Y. 343; *Wetherell v. Hamilton*, 15 Pa. St. 195; *Johnson v. Sherman*, 15 Cal. 287.

In some of the cases just mentioned it is held or implied that a different doctrine might be applied to a mortgagee in possession, receiving the rents. This distinction is on the ruling peculiar to those states in which they still adhere partially to common law rule, that the mortgagee in possession has "an estate in the land." *Teal v. Walker*, 111 U. S. 242.

Pace v. Chadderdon, 4 Minn. 499, has since been expressly repudiated. *Rogers v. Benton*, 39 Minn. 39.

In California it is held that the mortgagee of a term in possession as assignee is not liable upon the covenants of the lease on the ground that the mortgage is a mere security and does not vest in the mortgagee any estate in the lands either before or after condition broken. Nor does possession by the mortgagee affect the nature of his interest; it does not change the relation of debtor and creditor or impair the estate of the mortgagor, but leaves the rights and interests of the party exactly as they existed previously. *Johnson v. Sherman*, 15 Cal. 287; *Dutton v. Warschauer*, 21 Cal. 609; *Jackson v. Lodge*, 36 Cal. 28.

The court admitted evidence of the meaning and construction, not of any technical term in the lease, but of considerable portions and clauses of the lease. The admission of this testimony taken as it was, and not confined to technical terms in the lease, but to whole portions of the lease itself, was excepted to by defendants and is of itself sufficient to entitle them to a reversal.

Special damages are only allowed when they may reasonably be supposed to have been contemplated by the parties in making the

contract as the probable result of the breach. *Wilson v. Reedy*, 32 Minn. 256; *Frohreich v. Gammon*, 27 Minn. 476; *Goebel v. Hough*, 26 Minn. 252; *Cushing v. Seymour, Sabin & Co.*, 30 Minn. 301; *Williams v. Wood*, 55 Minn. 323; *Simmer v. City of St. Paul*, 23 Minn. 408; *Messmore v. New York Shot & Lead Co.*, 40 N. Y. 422.

The proper rule of damages is the difference between the rental value of the mill with the covenants fulfilled, and its value when they are not fulfilled for the time in question. *Winne v. Kelley*, 34 Ia. 399; *Fort v. Orndoff*, 7 Heisk. (Tenn.) 167; *Pawaukee Milling Co. v. Howitt*, 86 Wis. 270; *Duffield v. Rosenzweig*, 144 Pa. St. 520; *Great Western Printing Co. v. Tucker*, 73 Ia. 755; *Griffin v. Colver*, 16 N. Y. 489; *Cassidy v. Le Fevre*, 45 N. Y. 562; *Stern v. Rosenheim*, 67 Md. 503.

Plaintiffs cannot claim damages without having taken reasonable measures to decrease the amount of such damages. *Paine v. Sherwood*, 21 Minn. 225; *Great Western Printing Co. v. Tucker*, 73 Ia. 755; *Fort v. Orndoff*, 7 Heisk. (Tenn.) 167.

Losey & Woodward, Harries & Duxbury and E. C. Higbee, for respondents.

The so called defeasance as well as the unrecorded contract evince an intention of the parties to leave the fee and the possession in Sprague, even as between themselves, and secondly, that as between plaintiffs and Sprague the defendants are neither of them in a position to assert that the title was other than in Sprague. Upon its face this conveyance was a deed. Even as to subsequent purchasers the so called defeasance was not intended to operate as a notice that the title was other than in Sprague. This is evidenced from the fact that it was contemplated that he should make conveyances to purchasers. The undisputed facts clearly show this transaction a contract to reconvey, leaving the legal title in Sprague, even as between himself and Thompson. If our contention in this respect is correct, it ends the question of the liability of Sprague, for the covenants in the leases are those which run with the land and bind the grantee thereof by reason of the privity of estate. *Shaber v. St. Paul Water Co.*, 30 Minn. 179; *Leppla v. Mackey*, 31 Minn. 75; *Trask v. Graham*, 47 Minn. 571.

But if we were to concede that this transaction was, as between the parties, intended to leave the title and fee in Thompson, and as between themselves to be regarded as a mortgage, still we contend that as between the plaintiffs and Sprague, he is still liable upon the covenants in these leases because he is estopped as against the plaintiffs to take such a position. As such mortgagee he is shown to have been in the possession, receiving the benefits and emoluments thereof, and as such mortgagee is liable upon the covenants in these leases. The right of the mortgagee to receive, collect and hold rents, by all the authorities, is dependent upon his possession. But the only way to take possession of leased premises is to take the rents. *Chapman v. Porter*, 69 N. Y. 276; *Wood v. Whelen*, 93 Ill. 153; *Dawson v. Drake*, 30 N. J. Eq. 601; *Moffatt v. Smith*, 4 N. Y. 126.

The construction of these leases was for the Judge and he so held and withdrew the consideration of them from the jury. The Judge had the right in the consideration of the question to bring to his aid books of science, standard authors and expert witnesses to throw light upon the proper construction to be given to these contracts. Such evidence is permissible for that purpose, even when the question is submitted to the jury. *Merchant v. Howell*, 53 Minn. 295.

Defendants contend that the mill of the plaintiffs has been remodelled, so that more power is required for its operation than at the time when the leases were executed. The leases provide for a definite quantity of power to be furnished and the plaintiffs are entitled to utilize it to their greatest advantage.

These facts bring this case within the rule which permits a recovery of profits. *Hinckley v. Beckwith*, 13 Wis. 31; *Griffin v. Colver*, 16 N. Y. 489; *Goebel v. Hough*, 26 Minn. 252; *Fairchild v. Rogers*, 32 Minn. 269; *Musterton v. The Mayor &c. of Brooklyn*, 7 Hill, 61; *Blanchard v. Ely*, 21 Wend. 342; *Wakeman v. Wheeler & Wilson M'f'g Co.*, 101 N. Y. 205.

GILFILLAN, C. J. Thompson being the owner of real estate on which was a water power, on Root river, on April 27, 1872, he and his wife executed a lease to E. Vining White and Cyrus A. White of the exclusive right to use from said water power, for twenty years from that date, 7,505 cubic feet of water per minute, at a six-foot head

of water, at stipulated annual rent. On April 8, 1879, they executed to the same parties another lease, of the right to use for twenty years from the date of the first lease an additional quantity of water, sufficient to make, including the 7,505 feet, 10,000 cubic feet per minute under an eight-foot head, or its equivalent under such head as they may have; the head to be ascertained by measuring from the tail race of the mill, at its lowest stage of water, to the water in the canal immediately above the flume or flumes of the mill. As held when the case was here before 50 Minn. 211, (52 N. W. 644), the two are to be construed as one lease, the latter being supplementary to the former. The leases were assigned September 22, 1881, by the lessees to the plaintiffs. March 4, 1886, Thompson being still the owner of the property, and being indebted to the defendant Sprague in the sum of \$16,840.26, there were executed three instruments,—one a deed absolute in form, by Thompson and wife, conveying to Sprague several pieces of real estate, including the above-mentioned water power, and including “the right to receive, collect, and hold all rentals from any and all persons for the use of said property, or the water power thereon;” another, an instrument under seal, executed by Sprague, reciting the above conveyance, and also that the parties have executed another contract, of the same date, and that the conveyance was for the purpose of securing the performance on the part of Thompson of such other contract, and covenanting, upon its performance, to reconvey to said Thompson the said real estate and water power, or so much thereof as should not have been conveyed, with his written consent, prior to the performance of said contract. This instrument was recorded on the 15th, and the deed on the 14th, May, 1886. The third instrument was the contract referred to in the second, and was executed in duplicate by Thompson and Sprague. It contained a covenant by Sprague to reconvey to Thompson, on full performance of the conditions specified on his part, all the real estate, subject to any changes in the ownership which might result under the provisions of the contract; to convey any part of the premises, or to lease any part of the water power, pursuant to agreement to sell or lease, which Thompson might sell or lease,—any rent on a lease not to be below a specified rate,—with the condition that, if Sprague should deem the price in any such contract of sale inadequate, he might, at his option, take himself

the tract agreed to be sold at such price, the amount of the price to be applied upon the principal of the debt secured; all proceeds of sales or leases to be paid to Sprague. Thompson also covenanted to pay the debt of \$16,840.26 on or before ten years from the date, with interest at the rate of six per cent. per annum, payable annually; to pay all taxes; to keep the buildings insured,—the loss, if any, payable to Sprague, to the extent of his interest. On failure of Thompson to pay the taxes, or keep the buildings insured, Sprague was to have the right to do so. Thompson also covenanted to keep the premises and water power in good condition and repair, ordinary decay, wear, and tear, and injury from unavoidable accident, excepted. It was agreed that, Thompson performing the conditions of the contract, he should have the right to the possession and enjoyment of the premises, except the rental on any leases then or thereafter in force; and, as to those, Sprague was to receive and apply them—First, in payment of taxes, and repayment to Sprague of all sums paid by him for taxes and insurance, with interest from dates of payment; second, to payment of interest on the principal debt; third, any surplus remaining after the above to be held by Sprague as a reserve fund to be used in making repairs necessary from decay, wear, and tear, and unavoidable accident, to be made under the direction of Thompson; fourth, any sum remaining to be applied at the end of each second year in payment of the principal debt; Thompson to be allowed interest on any such surplus from the date of its receipt to the end of each second year at the rate of 6 per cent. per annum.

It was agreed that in case of failure by Thompson to pay the taxes or the interest on the debt within one year after due, or to perform the other conditions of the contract, or to pay the principal sum when due, Sprague might declare the contract closed, and sell the premises at public vendue, after a notice of sixty-days publication in one or more newspapers, and on such sale to convey the premises free from any right of redemption; the proceeds of sale to be applied in payment of costs of sale, of the debt, with interest, and all sums advanced for taxes, insurance, or otherwise; the surplus, if any, to be paid to Thompson, his heirs or assigns.

The plaintiffs insist these instruments evidence a conditional sale.

and not a mortgage. There can, however, be no serious question that the transaction was a mortgage. Though a conveyance be on its face absolute and indefeasible, it is a mortgage, if made as security for performance of something by the grantor, as for the payment of an existing debt. The purpose of this conveyance, as shown by all the instruments, was to secure payment of the debt from Thompson to Sprague. All other covenants, conditions, and stipulations were manifestly only in aid of that purpose; so that had the debt and such sums as, for the purpose of the security, became part of it, been at any time paid, that would have defeated the conveyance, certainly so far as Sprague had not, under the power contained in the instruments, conveyed or leased on sales or leases agreed on by Thompson.

The plaintiffs basing their claim to recover against Sprague on the proposition that he is an assignee of Thompson, so as to be liable on his covenants running with the land, must take the entire transaction just as it was between the parties to it. That the conveyance was, and the instrument setting forth the conditions on performance of which it should be defeated was not, recorded, was no concern of respondents, because their rights in the property are antecedent to the conveyance. They claim no rights under or through or against it, and there can be no estoppel in their favor as to the character of the conveyance, for they have not rightfully done anything in reliance on it as an absolute conveyance.

As mortgagee, merely, Sprague was not liable to the plaintiffs upon the covenants in their lease. The mortgage created no privity between him and them. It passed no estate in the land, but gave only a lien. This has been decided so frequently by this court that we need not cite the cases.

Respondents claim, however, it is different with a mortgagee in possession; that he has such an estate as makes him liable upon the covenants running with the land.

The contract between Thompson and Sprague reserves to the former the right to the possession and enjoyment of the premises, except the rental arising from any lease of the same. The assignment by way of mortgage of such rentals to Sprague, his collecting the same, and his entry upon the premises from time to time to attend

to or make the repairs covenanted for in the contract, are the only things that could go to characterize him as a mortgagee in possession. But we will assume that he was such.

What will constitute a mortgagee in possession was fully considered in *Rogers v. Benton*, 39 Minn. 39, (38 N. W. 765,) in which it was said, "The mortgagee must be in possession by reason of the assent or agreement of the mortgagor or his assigns that he have the possession under the mortgage, and because of it." But whether the mortgagee's relations to the title are in any way changed by his being in possession is a question we have never had before us. Upon this question, in the states where the rule is, as in this state, that the mortgage is only a security,—notably, in New York and California,—the courts differ. The courts in New York hold that although, when out of possession, both before and after default, the mortgagee has only a lien, when he is in possession he has an estate, and is liable on the covenants running with the land (*Astor v. Hoyt*, 5 Wend. 603; *Moffatt v. Smith*, 4 N. Y. 126), the court in the former case saying: "When the mortgagee takes possession, he then has all the right, title, and interest of the mortgagor. Then he acquires, and the mortgagor loses, an estate liable to be sold on execution." The decisions in that state merely state that to be the case, but contain no reasoning to show how the result is brought about.

In California it is held that the interest of a mortgagee in possession is the same as that of one out of possession (*Johnson v. Sherman*, 15 Cal. 287; *Dutton v. Warschauer*, 21 Cal. 609), the court in the former case saying: "Nor can possession under the mortgage affect the nature of the mortgagee's interest. It does not abridge or enlarge his interest, or convert what was previously a security into a seisin of the freehold. It does not change the relation of creditor and debtor, or impair the estate of the mortgagor, but leaves the rights and interests of the parties exactly as they existed previously."

We think the decisions of the California court in accordance with the better reason. We do not see how the mere act of the parties, of going into possession, and consenting to or acquiescing in it, can have the effect to pass the mortgagor's estate to the mortgagee. The latter, being let into possession under and because of the mortgage, is in only for the purpose of it, to wit, for security. There can be

no question but that he must account upon the mortgage debt for the net receipts because of the possession, nor but that, the debt being paid, his right to retain possession will, without any other act or ceremony, cease. The fact that the possession is added, as a further security, to the security which the mortgage of the title gives him, cannot change the lien of the mortgage into an estate. The right of the mortgagee remains a mere lien, though the power to enforce it against the profits issuing from the land is placed in his hands by letting him into possession. If an estate arises in the mortgagee, it is real estate, though the debt, of which it is only an incident, is personalty. Can the debt and the right of possession be severed? May the mortgagee assign the debt, as personalty, and retain the right of possession, as realty? In case of his death, will the estate go to the administrator, and the right of possession to the heirs? Or must both go to one, and to which of them?

An estate sufficient to have cast on it the burden of covenants running with the land will entitle the owner of it to the benefit of similar covenants, and *e converso*. In this state a mortgagee cannot, before foreclosure, maintain an action on the covenants in the deed to the mortgagor, though running with the land, because he is not the owner of the land with which such covenants run. We suspect the courts in New York would hesitate to hold that as soon as he gets possession he may sue upon or may release such covenants, which he certainly can do, if he has an estate that makes him the owner of them. We conclude that a mortgagee in possession is not subject to the burdens, nor entitled to the benefits, of covenants running with the land.

What was the effect of Thompson vesting in Sprague, by way of security or mortgage, "the right to receive, collect, and hold all rentals" for the use of the property, including the rentals upon the lease assigned by White Bros. to plaintiffs?

We may assume that an absolute assignment of the rents for the entire term of the lease is in effect an assignment by the lessor of the lease itself, bringing the assignee in privity with the lessee; putting him, for the purposes and term of the lease, in the place of the lessor; subjecting him to the burdens of the covenants on the part of the lessor, and entitling him to the benefits of the covenants on the part of the lessee enforceable during the term. In

such case the assignee is the owner of the rents, and he may do what he will with them,—collect them, accept something else in lieu of them, or release them; and he may, doubtless, accept a surrender of the lessee, except as to those covenants of the lease intended for the benefit of the estate after the term shall expire.

But an assignee of rents by way of mortgage can do none of those things, except to receive the rents, and apply them for the benefit of the lessor, towards satisfaction of his debt. His relation to them is the same as that of the mortgagee of the land towards the legal title,—that of one holding a lien; and, if he can maintain in his own name a suit to collect them, it must be as a trustee. He is not, therefore, an assignee, so as to be liable on the covenants in the lease.

There was no cause of action against Sprague. That, however, does not affect the defendant Thompson. There are various assignments of error which do affect him. There is one which is well founded. The plaintiffs called as a witness a hydraulic engineer, and were permitted to read to him extracts from the lease,—in one instance, as much as two folios,—and to ask him his judgment as to the proper meaning of the clauses; in other words, asked him to construe them. It was not for any witness, but was for the court, to construe them, in connection with the entire lease. If there were “words of art” used, it was proper for an expert witness to state the meaning of such words in the art. Such, for instance, is, in this lease, the term “head of water.” As that is a technical term in hydraulics, an expert might give its meaning. And as the clause in the lease, “head of not less than eight feet, measuring from the tail race of said mill, at its lowest stage of water,” suggests the question whether this means the lowest operating stage or stage when the water is being furnished to the mill, and it is being operated, or means the stage when the mill is at rest, and but little water is running through the tail race, it was competent for an expert to state the rule, if there were any, for measuring to ascertain the head of water,—whether to measure from the surface of the water in the tail race when the mill is in operation, or to measure from the surface of the water when the mill is at rest. And it was for the court, with such aids, to construe the clause.

Had the construction of the clauses given by the witness been

the one which the court would have been bound to put on them, admitting the witness' construction would have been error without prejudice. The construction of this witness required the measurement to ascertain the head to be taken from the surface of the water in the tail race at its lowest stage when the mill was in operation, and the volume of water to be furnished was passing through. Another witness—a hydraulic engineer—stated (and it ought not to have been permitted, had it been objected to) his understanding of the clause, "lowest stage of water," to be the lowest stage at which it is ever found. And he stated facts important and proper for the court to consider in construing the clauses, which were that measuring from the surface of the water at the lowest stage ever found would give a fixed, or nearly fixed, standard for measuring, while measuring from the surface when the mill is operating would give a variable or shifting standard. Whether the court considered and passed upon the testimony as to these facts, and other testimony bearing on the conditions and circumstances of the subject-matter of the clause, or merely adopted the testimony of the first of these expert witnesses, as establishing its proper construction, we are unable to say, and cannot, therefore, say that admitting his opinion, did not prejudice.

And, *prima facie*, construed by the words alone, the clause means the lowest stage of water at any time, and without reference to whether the mill was running or not, though that apparent meaning might be modified by evidence of the character we have above indicated as proper.

There are many other matters presented by appellants, and, in view of a second trial, we will consider such of them as we think likely to arise on such trial.

The appellants claim that as, by the terms of the leases, the water was to be used in propelling the Crescent Mill,—a mill existing when they were executed,—and as at that time the capacity of that mill was such that it could be successfully operated at a head, say, of six feet, plaintiffs cannot complain for a failure to furnish the excess above that. There is nothing in the claim. The covenant was not to furnish enough water to run the mill in its then capacity, but was absolute,—to furnish 10,000 cubic feet per minute, at an eight-foot head, or its equivalent. Plaintiffs had an absolute right

to that quantity of power, and had the right to enlarge the capacity of their mill till they could use all of it. Of course, if, at any time when the stipulated amount was not furnished, they could not have used it, had it been furnished, that would have gone to the measure of damages.

The question of the proper measure of damages is raised.

In the first place, the appellants contend that the rule of damages, or the redress of the lessees, in case of failure to furnish the stipulated quantity of water, is fixed by the lease. The question on demurrer to the complaint, of which the leases are made a part, was passed on when the case was here before. 50 Minn. 211, (52 N. W. 644.) It was held that the clause in the lease limiting the lessees' remedy to an abatement of rent in case there should not at any time, from any cause whatever, be a sufficient quantity of water to supply the stipulated amount, referred to a case of shortage of water when the dam was maintained at a proper height, and it and its adjuncts kept in the agreed state of repair, and free from obstructions. It follows from that construction of the lease that an action will lie for any damages caused by a failure to supply water through any neglect or omission of the lessor. The right to such damages would not depend on the good or bad faith of the lessor, but solely on his neglect or omission. Where a party to a contract is exposed to injury by neglect of the other party to perform the covenants on his part, the injured party has no right to aggravate the damages, either by affirmative acts, or by the neglect of ordinary care and reasonable precaution to avert or lessen the injury. We have found no case, however, which holds—and the proposition is unreasonable—that the duty of ordinary prudence to lessen the injury extends so far as to require of him to perform the covenants of the other party. Whether, in this particular case, ordinary prudence would have lessened the injury, and to what extent, and whether the party did what it required of him, are questions for the jury.

The principal question, however, on the matter of damages, arose on allowing profits that would have been made while the mill was, for want of water, unable to run. The court permitted the plaintiffs to prove that during that period they either had, or could have procured, wheat to keep the mill running to its full capacity, with 10,000 feet of water at an eight-foot head, or its equivalent; how

many barrels of flour it could make at that capacity, and the profits on each barrel,—and instructed the jury that they might allow such profits lost, as an item of damages.

Taking as the test of the right to recover such profits the second branch of the rule in *Hadley v. Baxendale*, 9 Exch. 341, that the injured party has the right to recover such damages “as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it,” now universally approved, the first question is, is it to be reasonably supposed that, when making these leases, both parties had it in contemplation that these profits would, in whole or in part, be lost to the lessees, as the probable result of a breach by the lessor of the covenant to furnish the stipulated quantity of power?

The lessees took the lease for the purpose of engaging in the business of manufacturing flour; the power was leased for that purpose; and both parties knew that if the power were not furnished the business would be suspended or interrupted, and the lessees would consequently be deprived of such profits as might have been made in the business but for the suspension or interruption. And the loss of such profits must have been in contemplation of both, as the probable result of a breach of the covenant to furnish the power. To bring the case within the rule, it was not necessary they should have had in mind the amount of profits, or the extent of the loss from the breach. It was enough that they must have contemplated loss of profits as the result of a breach.

Within the rule stated, the damages sought to be recovered must not be remote, nor speculative, nor contingent, but direct, and shown with certainty to have been caused by the breach. An illustration of too remote damages would have been furnished, had plaintiffs claimed that, in consequence of not receiving the profits on their milling business, they lost profits of other enterprises, which they might have entered on with the profits of their milling business.

In respect to the profits of the business, their loss might appear to have been due to some other cause than failure to supply water to the mill. But, if not due to any other cause, their loss was sufficiently direct. Although the loss is direct, the amount must not be left to speculation or conjecture, but must be proved with reasonable certainty. Absolute certainty, however, is not required.

Mississippi & Rum River Boom Co. v. Prince, 34 Minn. 71, (24 N. W. 344.)

But, profits lost being allowed as damages, no expenses of keeping and caring for the mill could be allowed, except such as were made necessary by the mill being idle, and as would not have accrued had the mill been running.

Order reversed.

BUCK, J., absent, sick, took no part.

CANTY, J., (dissenting.) I agree with the majority of the court that, in this case, covenants which run with the land will not run with the rent alone. Whether such covenants will run with rent alone is a mooted question. See *Wood, Landl. & Ten.* § 310. In the cases in which it has been held that such covenants will run with the rent alone, the assignment of the rent gave the assignee as complete control during the term for which the rent was assigned as the assignor could give him. It put the assignee in the shoes of the landlord as completely as possible without a conveyance of the reversion. But the assignment of the rents to come due on the water-power leases in this case did not do so. It was an assignment of rent issuing out of a mere easement, an incorporeal chattel interest in other respects like an incorporeal hereditament, while the lessor himself still remained in the possession of the estate out of which the incorporeal interest issued. The lessor, remaining in exclusive possession of such estate, was alone in position to maintain the dam and head race, and keep them in repair, as he covenanted to do in the water-power leases.

But I dissent from the opinion of the majority that a mortgagee in possession is not liable on such covenants. While the deed from Thompson to Sprague, and the two contracts between them, constituted a mortgage, and gave Thompson the right to possession as long as he performed the contract on his part, on his default it gave Sprague the right to take possession; and there is sufficient evidence in this case to make it a question for the jury whether or not Sprague did subsequently take possession with Thompson's consent. The position of the majority seems to be that the assignment from the lessor which will create privity of estate between his tenant and his

assignee must be a transfer of all the landlord's legal title; that what may be termed a "sublandlord," like a "subtenant," is not an assignee, and therefore not liable on covenants which run with the land. It is well settled that this is not the law. A transfer of the landlord's interest for the time, or part of the time, the lease runs, is sufficient. "A concurrent lease is one granted for a term which is to commence before the expiration or other determination of a previous lease of the same premises, made to another person, or, in other words, an assignment of a part of the reversion, entitling the lessee to all the rents accruing upon the previous lease after the date of his lease, and all the remedies against the tenant under the prior lease, which his lessor would have had, except for the assignment. But, unless under seal, it does not have this effect, because it does not come within the provisions of St. 32 Hen. VIII. ch. 34." Wood, Landl. & Ten. (1st Ed.) § 232. In the note to *Spencer's Case*, 1 Smith, Lead. Cas. 77 (page 151, 8th Ed.), it is said: "It is also well settled that an assignee of part of the reversion, e. g. for years, is within the act [citing authorities]; and so, also, is the assignee of the reversion in a part of the land."

Prior to said statute of 32 Hen. VIII. ch. 34, few covenants which ran with the land ran with the reversion, and the assignee or grantee of the landlord could neither sue the tenant, nor be sued by him; and whether a mortgagee in possession is in privity of estate with the tenant, so that he may sue or be sued on the covenants in the lease made by the mortgagor depends on the proper interpretation of that statute. In all of those states in which the mortgagee does not take the legal title, and has but a lien, a mortgagee not in possession is not an assignee under this statute, and cannot sue upon, or be sued upon, such covenants. The possessory right or estate of such a mortgagee in possession is somewhat anomalous. He has a legal right or estate, as distinguished from a mere equitable one, and his estate is a complete defense to an action of ejectment, and he can only be deprived of his possession by an action to redeem in a court of equity. *Pace v. Chadderdon*, 4 Minn. 499 (Gil. 390); *Jones v. Rigby*, 41 Minn. 530, (43 N. W. 390.) His possessory estate partakes somewhat of the nature of a leasehold estate, but is certainly of a higher character than any lease for years. It is more than a lease to the mortgagee, to terminate on payment of the

mortgage debt. It is a surrender to the mortgagee, which gives him rights of a higher character than a mere possessory lien, one of which rights is the right to claim adversely to the mortgagor, and thereby set in motion a process of strict foreclosure, which will ripen into full title. *Rogers v. Benton*, 39 Minn. 39, (38 N. W. 765.) In fact, there is not much difference between the substantial rights of a mortgagee in possession under such a mortgage, and of a mortgagee in possession under a mortgage conveying the legal title. The difference between the two is almost wholly technical, and each holds a legal estate,—one which a court of law will recognize. But it is well settled that the holder of a mere lien secured by possession is an assignee under the statute, and has privity of estate which gives him the benefit, and makes him liable for the burdens, of covenants in leases. In the great leading case on the interpretation of this statute (*Spencer's Case*, 5 Coke, 16), the fifth resolution, after naming several ways in which the interest, or a part of the interest, of a party to the lease may be transferred to another, who thereby comes into privity of estate, lays it down, "The same law is of tenant by statute merchant or statute staple or *elegit* of a term." In each of these cases the creditor merely held possession of the land, with the right to satisfy his debt out of the rents and profits. He held no higher estate.

Since the case of *Williams v. Bosanquet*, 1 Brod. & B. 238, it has generally been held in England that a mortgagee taking the legal title is liable on the covenants in a lease, whether he takes possession or not. This case was decided after much consideration, and after taking the opinion of all the judges. It goes very extensively into the question of the rights and liabilities of a mortgagee in such a case, and reviews the English authorities, and the distinctions made by the different cases. While it overrules *Eaton v. Jaques*, 2 Doug. 460, it also attempts to distinguish that case in the following language (page 260): "*Eaton v. Jaques* will stand on its own peculiar ground, which is that an assignment of a lease, taken by way of pledge or security, differs in this respect from an absolute assignment, so that entry and possession are necessary." It seems to me that is exactly in point here. In *Williams v. Bosanquet* it is conceded that possession, either actual or constructive, is necessary to bring the assignee within the statute; but it holds that in cases

where the instrument itself gives the assignee constructive possession, so that neither livery of seisin or formal entry on his part is necessary, but the instrument of transfer carries to him the constructive possession, actual possession is not necessary.

In that case there was a default in the mortgage and the mortgagee was entitled to the immediate possession. It seems to me that on the authority of these cases a mortgagee in possession not having the legal title but a mere lien and the right to possession, is an assignee within the statute of 32 Hen. VIII. ch. 34 and should be held liable on covenants running with the land.

(Opinion published 59 N. W. 638.)

HANS H. OLSON *vs.* LEVI M. COOK *et al.*

Argued May 31, 1894. Affirmed June 22, 1894.

No. 8638—8639.

Statutory liability of stockholders how enforced.

The statutory liability of stockholders for corporate debts cannot be enforced in insolvency proceedings against the corporation under the Laws 1881, ch. 148, but pending such insolvency proceedings the creditors may bring an action to enforce that liability under 1878, G. S. ch. 76, § 17, in which the court may at once determine the maximum liability of each stockholder, and await the result of the insolvency proceedings to ascertain how much of it shall be enforced by execution.

The liability extends to all debts.

One acquiring stock in a banking corporation incurs the statutory liability, not only in respect to corporate debts contracted after he became a stockholders, but also in respect to debts contracted before that time. *Gebhard v. Eastman*, 7 Minn. 56 (Gil. 40), followed.

Appeal by defendants, Levi L. Cook, Willis H. Manley and Eliza Roos, from an order of the District Court of Hennepin County, *Henry G. Hicks, J.*, made November 27, 1893, overruling their demurrers to the complaint.

The plaintiff, Hans H. Olson, on July 7, 1892, deposited in the State Bank of Minneapolis \$123.60 and took a certificate due in one

57	552
58	436
57	552
59	228
60	356
57	552
61	390
57	552
62	508
57	552
66	382
66	445
57	552
68	98

year. On August 30, 1893, he recovered judgment thereon against the bank for \$139.13. A writ of execution was issued and returned unsatisfied. The bank suspended payment June 22, 1893, and five days thereafter being insolvent made an assignment of all its property to George H. Fletcher under Laws 1881, ch. 148, in trust for the equal benefit of all its creditors. On August 12, 1893, Fletcher resigned his trust and Wm. J. Hahn was appointed in his stead and the assets transferred to him by the order of the District Court. The assets were not more than \$100,000 and the debts not less than \$500,000. The capital of the bank was \$100,000 divided into shares of \$100 each. It was at first \$60,000 but on August 5, 1886, it was increased to \$75,000 and on July 7, 1892, to \$100,000. Of these shares Levi L. Cook held twenty-five, Eliza Roos forty and Willis H. Manley ten. The remaining shares were held by Kristian Kortgaard and others. Cook acquired his shares prior and Roos and Manley after July 7, 1892. The plaintiff commenced this action September 23, 1893, under 1878 G. S. ch. 76, against all the stockholders to enforce their double liability. The complaint stated the foregoing facts and others and asked that all creditors be required to come in and prove their claims or be precluded from all benefit of the judgment and from any distribution made under it. The defendants severally demurred to the complaint on the grounds that there is another action pending between the same parties for the same cause; to-wit, the insolvency proceedings under Laws 1881, ch. 148; and that it does not state facts sufficient to constitute a cause of action. The demurrers were overruled. The three defendants above named appealed and stipulations were made with the others that all the demurrers should abide the result of these three.

James O. Pierce and George D. Emery, for appellants.

The demurrers should have been sustained on the ground of another action pending. *Allen v. Walsh*, 25 Minn. 543; *Johnson v. Fischer*, 30 Minn. 173; *Merchants' Nat. Bank v. Bailey Mfg. Co.*, 34 Minn. 323; *Arthur v. Willius*, 44 Minn. 409; *McKusick v. Seymour, Sabin & Co.*, 48 Minn. 158; *State v. Bank of New England*, 55 Minn. 139; *Merchants' Nat. Bank of Chicago v. Northwestern Mfg. & Car Co.*, 48 Minn. 349; *Minnesota Thresher Mfg. Co. v.*

Langdon, 44 Minn. 37; *Mohr v. Minnesota Elevator Co.*, 40 Minn. 343.

The complaint does not set forth all the requisite facts or ask the proper relief necessary to make it sufficient under 1878 G. S. ch. 76.

This proceeding is brought prematurely. While stockholders may, in a proper proceeding, be held to their statutory liability, this is only to be done after the corporate assets have been fully administered and found to be insufficient. The liability of the stockholder is that of a surety. *Tripp v. Northwestern Nat. Bank*, 41 Minn. 400.

A stockholder is not liable to action for statutory liability, where it does not appear that the corporate assets proper have been fully administered and that a deficiency is ascertained. *Stewart v. Lay*, 45 Iowa, 604; *Appeal of Means*, 85 Pa. St. 75; *Cambridge Water Works v. Somerville Dyeing & B. Co.*, 4 Allen 239; *McClaren v. Franciscus*, 43 Mo. 452; *Toucey v. Bowen*, 1 Bissell, 81; *Drinkwater v. Portland Marine Ry.*, 18 Me. 35; *Merchants' Nat. Bank v. Bailey Mfg. Co.*, 34 Minn. 323; *Nolan v. Hazen*, 44 Minn. 478.

Only debts proper of the corporation are enforceable against the stockholders; not damages recovered in actions of tort. *Cook, Stockholders* (2nd Ed.) § 217. Damages recovered by reason of a bridge being out of repair are not included. *Heacock v. Sherman*, 14 Wend. 58. Nor damages for infringement of a patent. *Child v. Boston & Fairhaven Iron Works*, 137 Mass. 516. Nor damages for loss of a steamboat. *Bohn v. Brown*, 33 Mich. 257. Nor damages against a common carrier for negligence. *Stanton v. Wilkeson*, 8 Ben. 357.

So far as the allegations of the complaint may be taken as sufficient, not a single present indebtedness of the bank has accrued since either appellant Roos or Manley became a stockholder. A registered stockholder is liable, not for debts contracted before he became such, but for those contracted while he was such, although he subsequently transfers his stock. *Cook, Stockholders*, § 259; *Moss v. Oakley*, 2 Hill, 265; *Adderly v. Storm*, 6 Hill, 624; *Judson v. Rosie Galena Co.*, 9 Paige 598; *McCullough v. Moss*, 5 Denio, 567; *Williams v. Hanna*, 40 Ind. 535; *Larrabee v. Baldwin*, 35 Cal. 155; *Coleman v. White*, 14 Wis. 700.

Stock not issued when the plaintiff's debt was contracted, cannot be called upon to contribute to his debt, because he could not have dealt with the company upon the faith of any capital represented by any such stock. *First Nat. Bank v. Gustin, M. C. Mining Co.*, 42 Minn. 327; *Hospes v. Northwestern Mfg. & Car Co.*, 48 Minn. 174.

Jno. W. Arctander, for respondents.

There was no other action pending. A stockholder's liability is not a corporate asset. *Dutcher v. Marine Nat. Bank*, 12 Blatchf. 435; *Jacobson v. Allen*, 20 Blatchf. 525; *Fransworth v. Wood*, 91 N. Y. 308; *Wright v. McCormack*, 17 Ohio St. 86; *Arenz v. Weir*, 89 Ill. 25; *In re People's Live Stock Ins. Co.*, 56 Minn. 180. All the powers conferred upon the Assignee under Laws 1881, ch. 148, are, to take into his possession all the property of the debtor, and to convert the same into money and distribute the net proceeds thereof in the way designated by law, and to bring actions to avoid unlawful preferences. It is in doing the latter only that the assignee, by statute is clothed with the power to represent the creditors. 1878 G. S. ch. 41, § 27; *Bristol v. Sanford*, 12 Blatchf. 341; *State v. Bank of New England*, 55 Minn. 139.

The remedy under chapter 76 is exclusive. *Allen v. Walsh*, 25 Minn. 543; *Johnson v. Fischer*, 30 Minn. 173; *Mohr v. Minnesota Elevator Co.*, 40 Minn. 343; *Patterson v. Stewart*, 41 Minn. 84; *St. Louis Car Co. v. Stillwater Street Ry. Co.*, 53 Minn. 129.

This suit was not prematurely brought. *State Savings Ass'n v. Kellogg*, 52 Mo. 583; *Shellington v. Howland*, 53 N. Y. 371; *Flash v. Conn.*, 109 U. S. 371; *Morgan v. Lewis*, 46 Ohio St. 1; *Munger v. Jacobson*, 99 Ill. 349; *Patterson v. Wyomissing Mfg. Co.*, 40 Pa. St. 117; *Hospes v. Northwestern Mfg. & Car Co.*, 48 Minn. 174.

Stockholders who become such after the debt is contracted are liable under the statute for debts made before they become stockholders. The leading case against this position is *Moss v. Oakley*, 2 Hill, 265, in which case the court states that it does not regard the question as clear or free from doubt. It bases its conclusion as to the proper interpretation of the statute upon the nature of the particular case, and the general scope of the New York statute. New Hampshire, although deciding the question the same way, expressly

disclaims following *Moss v. Oakley*, and bases its decision upon the peculiar language of the statute. *Chesley v. Pierce*, 32 N. H. 388. The statute of California is as follows: "Each stockholder shall be individually and personally liable for his proportion of all the debts and liabilities of the company contracted or incurred during the time that he was a stockholder." See *Larrabee v. Baldwin*, 35 Cal. 155.

An examination of the authorities will show that opposed to the doctrine of *Moss v. Oakley*, as followed by Indiana and Maryland, stand Maine, Massachusetts, Connecticut, Rhode Island, Ohio, Illinois, Missouri and Wisconsin. *Longley v. Little*, 26 Me. 162; *Curtis v. Harlow*, 12 Metc. 3; *Holyoke Bank v. Burnham*, 11 Cush. 183; *Middletown Bank v. Magill*, 5 Conn. 28; *Sayles v. Bates*, 15 R. I. 342; *Brown v. Hitchcock*, 36 Ohio St. 667; *Railroad Co. v. Smith*, 48 Ohio St. 219; *Root v. Sinnock*, 120 Ill. 350; *McClaren v. Franciscus*, 43 Mo. 452; *Skrainka v. Allen*, 76 Mo. 384; *Griswold v. Seligman*, 72 Mo. 129; *Cleveland v. Burnham*, 55 Wis. 598; *Day v. Vinson*, 78 Wis. 198.

But the question is really *res judicata* in Minnesota. Although we have no direct decision on the particular statute in question, the Supreme Court of this state is committed by a prior ruling upon a statute identical in terms. I refer to the case of *Gebhard v. Eastman*, 7 Minn. 56.

GILFILLAN, C. J. The bank defendant was incorporated under the laws of this state to do a banking business, at first with a stock capital of \$60,000, afterwards increased to \$75,000, and later still to \$100,000. June 27, 1893, it made, under the insolvent law, an assignment for the benefit of its creditors, and defendant Hahn is the assignee thereunder. July 7, 1892, plaintiff made a deposit with the bank, repayable to him in 12 months after that date. It not being paid when due, on August 19, 1893, he recovered judgment against the bank for the deposit, issued execution thereon, and September 5, 1893, it was returned wholly unsatisfied, for want of property whereon to levy.

The plaintiff brings this action in behalf of himself, and all other creditors of the bank who shall exhibit their claims and become par-

ties to the action, against all the stockholders, to enforce their statutory liability; and he asks for the appointment of a receiver to receive and distribute the proceeds of enforcing it.

The allegations of the complaint are full, stating, in addition to the foregoing facts, among other things, that the property and assets of the bank are of not higher value than \$100,000, and that it is indebted in more than \$500,000.

Several of the stockholder defendants demurred to the complaint on the grounds that it appears therefrom that there is another action pending between the same parties for the same cause, and in which the same relief may be had, and that the complaint does not state facts sufficient to constitute a cause of action. From orders overruling such demurrers, these appeals are brought.

The objection that the complaint shows another action pending for the same cause is based on the proposition that the statutory liability of stockholders of an insolvent corporation may be enforced in insolvency proceedings against the corporation under the law of 1881.

The question was indirectly before us in *State v. Bank of New England*, 55 Minn. 139, (56 N. W. 575,) in which it was stated, as a distinction between proceedings against an insolvent corporation under 1878, G. S. ch. 76, and insolvency proceedings under the act of 1881, that, under the former proceedings, directors and stockholders may be brought in, and their liabilities to creditors enforced; and it was assumed, or taken for granted, that this cannot be done under the latter proceedings. Chapter 76 clearly contemplates bringing in stockholders for that purpose. If this were not so, then, so far as that chapter is concerned, the creditors would be left to a suit in equity to enforce any liability of stockholders, other than such as are deemed assets of the corporation. The statute determines the scope and compass of every special proceeding provided by it; and if authority is not found, either in express terms or by implication, in a statute regulating a special proceeding, for doing a particular thing, there is no authority. In *re People's Live Stock Ins. Co.*, 56 Minn. 180, (57 N. W. 468,) it was held that the proceeding regulated by 1878, G. S. ch. 34, §§ 415 to 420, inclusive, being one to dissolve a corporation, settle its business, and convert its assets, and apply the proceeds in payment of its debts, stockholders cannot be

brought in to answer to their statutory liability, for the reason that the statute does not so provide, though they may be to enforce unpaid subscriptions, because such are assets of the corporation.

And it is the same with insolvency proceedings under the law of 1881. There is nothing in that law to suggest that any remedy of creditors who come into the proceeding can be enforced, except as to the assets of the debtor. It is a proceeding merely to convert such assets, and apply the proceeds upon the claims of such creditors as come in, and comply with the terms of the law. There is no provision either for bringing in the stockholders of a corporation debtor, or for bringing in the other creditors who are equally interested in the statutory liability with those who voluntarily come in, or for sequestering that liability for the benefit of the latter. That liability cannot be enforced in the insolvency proceeding.

The proceeding commenced under chapter 76, § 9, is, primarily, one to convert the assets and pay the debts; and, as such, it and an insolvency proceeding under the act of 1881 cannot go on effectually at the same time against the same corporation. If both are commenced, one or the other must give way. In the nature of things, there cannot be two proceedings, whose sole purpose is to administer the same assets, running at the same time. But by the provisions of 1878, G. S. ch. 76, §§ 15, 16, the purpose of a proceeding commenced under section 9 may be enlarged so as to make it a proceeding to enforce the statutory liability of directors and stockholders, as well as to administer the assets of the corporation.

Under the ground of demurrer that the complaint does not state facts sufficient to constitute a cause of action, the objection is made that the action is prematurely brought. This is on the proposition that, before creditors can seek to enforce the statutory liability of stockholders, they must first exhaust their remedies against the property of the corporation. Whether this be so in case of a suit in equity, where there is no statute affecting it, we do not think it necessary to inquire. There are certainly authorities which hold the affirmative.

Chapter 76, §§ 17 to 23, inclusive, authorize an action by creditors to enforce the statutory liability of officers, directors, and stockholders; and while, in such an action, it would be required of the complaint to show a necessity to resort to that liability in order to sat-

isfy the corporate debts (which the complaint in this case does), it certainly would not be required of it to show to what extent such resort is necessary, or to show that the corporate assets have been exhausted without satisfying the debts. Section 18 reads: "The court shall proceed thereon [on the complaint filed under section 17] as in other cases, and, when necessary shall cause an account to be taken of the property and debts due to and from such corporation, and shall appoint one or more receivers." Section 19: "If, on the coming in of the answer, or upon the taking of any such account, it appears that such corporation is insolvent, and that it has no property or effects to satisfy such creditors, the court may proceed without appointing any receiver to ascertain the respective liabilities of such directors and stockholders and enforce the same by its judgment as in other cases." Section 20 provides that upon final judgment in such an action the court shall cause a just and fair distribution of the property of such corporation, and of the proceeds thereof, to be made among its creditors. Section 21 provides that, if the property of the corporation is insufficient to satisfy its debts, the court shall enforce the payment of anything unpaid on the shares of stock, or so much thereof as is necessary to satisfy the corporate debts; and section 22, that if the debts remain unsatisfied the court shall proceed to ascertain the respective liabilities of the directors or other officers, and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment as in other cases. Section 23 provides for calling in creditors other than those bringing the action.

It is apparent from these sections that, where resort to the statutory liability is shown to be necessary, the creditor need not, before bringing the action, exhaust his remedies against the corporate property. That may be done in the action itself.

It is a somewhat curious feature of chapter 76 that it provides two actions on behalf of creditors,—one commenced under section 9, primarily to sequester the corporate assets, and apply the proceeds in payment of debts, in which, at the election of creditors, may be supplemented a proceeding to enforce the statutory liability; the other, under section 17, primarily to enforce that liability, but as incident to which there may be a sequestration of the corporate assets.

As the same measure of relief may be had in each of these actions, neither of them can be brought while the other is pending.

But suppose there is some other proceeding pending, such as insolvency proceedings, or a proceeding under 1878, G. S. ch. 34, §§ 415 to 420, inclusive, in which only part of the relief to which creditors are entitled can be had,—in which nothing can be done but to sequester, convert, and apply on the corporate debts the proceeds of the corporate assets. Cannot the action provided by 1878, G. S. ch. 76, §§ 17 to 23, inclusive, be brought to secure the remainder of the relief contemplated by that action? We do not see any but the most technical reason why it may not. It may be brought where no receiver to convert the corporate assets and apply the proceeds will be necessary, because there are no such assets. Why should it not be brought where the receiver will not be necessary because such assets are already in process of conversion and application in another proceeding, in which the same result will be brought about, so far as such assets are concerned, as would be produced by the court appointing a receiver in the action, if there were corporate assets for him to administer? In such a case there would be nothing to prevent the court determining at once the maximum liability of each officer, director, and stockholder, as it might do if it also appointed a receiver to administer the corporate assets. It is true that before determining how much should, within that maximum, be collected from each, it would have to await the result of the other proceeding. But, if it appointed a receiver to administer corporate assets, it would, for the same purpose, have to await the result of the proceedings of its own receiver.

We think such an action may be brought pending the insolvency proceeding, that this is such an action, and that consequently it was not prematurely brought.

The next reason urged, that the complaint does not show a cause of action, is that it does not appear thereby that any of the corporate debts mentioned were contracted after the appellants acquired their stock; that, as to two of such appellants, it appears, inferentially at least, that their stock is of the new issue, and it does not appear that any of the debts were contracted after such stock issued. The two propositions raised but one question, to wit, does one who acquires stock in a banking corporation incur the

statute liability in respect to corporate debts previously contracted, or does he incur it only in respect to debts subsequently contracted?

The decisions of the courts in the different states seem at variance, the greater number holding that those who own the stock when the remedy is sought by the creditors—that is, when the action to enforce the liability is brought—are liable in respect to all the corporate debts, no matter whether contracted before or after they acquired their stock. The decisions in each state are based on the terms of the statute in each, as construed by the court; and, as the terms of the statutes in the different states vary, but little aid is afforded by the decisions in other states.

Our statute is 1878, G. S. ch. 33, § 14: "Every person becoming a stockholder therein, shall in proportion to his interest, succeed to all the rights and be subject to all the liabilities of prior stockholders." Section 21: "And the stockholders in each bank shall be individually liable in an amount equal to double the amount of stock owned by them for all the debts of such bank and such individual liability shall continue for one year after any transfer or sale of stock by any stockholder or stockholders."

The terms "all the debts of such bank" are general, unqualified, and include all debts, without regard to when incurred. To exclude from their meaning those incurred prior to becoming stockholder, we would have to add, after the word "bank," some such words as "contracted after they acquired their stock," and to hold that the legislature, while intending what such words would mean, omitted, for some reason or other, to express such meaning by apt terms. It is more in accordance with the rules of interpretation to hold that the legislature refrained from using any such words because it did not intend what they would express.

But the point was really decided in this state more than thirty years ago, and the decision has been acquiesced in, accepted, and regarded as the law ever since, till questioned in this case. In *Gebhard v. Eastman*, 7 Minn. 56 (Gil. 40), the court construed a statute somewhat less emphatic in its terms than 1878, G. S. ch. 33, § 21. The terms in that case were, "Each of the stockholders of said company shall be personally liable for the debts of said company to an amount equal to the amount of capital stock held by such stockholder and no more." It was held that the act created a personal

liability against each stockholder at the time the debt was contracted, "and all that may voluntarily become so at any subsequent period prior to satisfaction."

Noting that this statute does what that did not, to wit, limit the liability to one year after the stockholder shall have transferred his stock, that decision disposes of the question here in hand.

Orders affirmed.

COLLINS and BUCK, JJ., took no part in the decision.

(Opinion published 59 N. W. 635.)

INDEX.

ACCOMMODATION PAPER. See **BILLS AND NOTES.**

ACCORD AND SATISFACTION.

If an accord and satisfaction be rescinded by the parties, the original demand is revived and suit may be brought thereon. *Heavenrich v. Steele*, 221.

ACCOUNT STATED.

When an account is stated, the balance struck becomes an original demand. The transaction amounts to a promise to pay that balance. Fraud or mistake must be shown to open the account. *Christofferson v. Howe*, 67.

A note taken for such balance of an account is a satisfaction of the items in the account, and not a renewal. *Id.*

ACTION. See **PARTIES TO ACTIONS**, 319; **PLEDGE**, 341.

In trover for goods converted, a mortgage on the goods to a stranger will not absolve the wrongdoer or diminish his damages. *Vandiver v. O'Gorman*, 64.

ADMINISTRATION OF DECEDENTS' ESTATES. See **EXECUTORS AND ADMINISTRATORS**, 109.

The expense of hunting up the next of kin of the deceased cannot be allowed as a part of the expense of administration. *In re Glynn's Estate*, 21.

ADJOURNMENT OF TRIAL. See **JUSTICE'S COURT**, 108.

ADVERSE PARTY.

The adverse party on whom a notice of appeal is to be served, is the party, whether plaintiff or defendant, whose interests in the question sought to be reviewed on the appeal are adverse to appellants. *Frost v. St. Paul B. & Invest. Co.*, 325.

ADULTERY.

Upon a charge of adultery the testimony of the injured husband or wife is competent to prove the offense. *State v. Vollander*, 225.

AFFIDAVIT. See **OATH**, 425.

A finding of facts on affidavits presented on a motion to vacate an attachment sustained. *Fitzgerald v. McMurran*, 312.

Findings of facts based on conflicting affidavits are conclusive. *State v. Madigan*, 425.

AGENCY. See **PAYMENT**, 395.

At defendant's request the plaintiff sent her stock to a particular bank to be delivered to defendant on payment of the price; held, the bank was defendant's agent, not hers. *McMullen v. People's Sav. & L. Ass'n*, 33.

AGENCY—Continued.

ratification of the acts of an unauthorized agent will be presumed if the principal neglect for an unreasonable time to repudiate. This equitable estoppel may be invoked against the principal but not in his favor. *Turner v. Kennedy*, 104.

Agency is not proved by showing in evidence the admissions of the supposed agent. *Halverson v. Chicago, M. & St. P. R. Co.*, 142.

An agent for a bailee of property is not liable for a conversion by his principal in which he does not actually participate. *McLennan v. Minneapolis & N. E. Co.*, 317.

An agent who deposits in bank money of his principal in his own name, thus "A. J. Miller, Agent" cannot maintain an action, for it in his own name after his agency ceases. *Miller v. State Bank of Duluth*, 319.

A solicitor for insurance is the agent of the insurer, not of the person insured, in all he does in preparing the application and stating its contents and effect. *Whitney v. National M. A. Ass'n*, 472.

Statements of an agent of defendant are not evidence unless made within the scope of his agency. *Colby v. Life Indemnity & I. Co.*, 510.

AGREEMENTS. See CONTRACTS.

ALLEY. See ROADS AND STREETS, 422.

ANSWER. See PLEADING, 140.

Facts stated in an answer constituting a counterclaim will be treated as such although not designated therein as a counterclaim. *Farrell v. Burbank*, 395.

APPEAL TO SUPREME COURT. See BOND ON APPEAL, 37.

An appeal held taken for delay and three per cent of the judgment allowed respondent for additional costs. *Bardwell-Robinson Co. v. Brown*, 140.

The adverse party on whom a notice of appeal is to be served, is the party, whether plaintiff or defendant, whose interests in the question sought to be reviewed are adverse to the appellants. *Frost v. St. Paul B. & Invest. Co.*, 325.

Where there are several parties to the action, some of whom are not served with the notice of appeal, the court will consider only those questions in which the interests of those not served are not adverse to the claims of appellant. *Id.*

Where the error or mistake complained of is not that of the court itself, but of the jury or clerk, it cannot be raised on appeal. It should be corrected by application to the trial court. A verdict in excess of the amount claimed should be there corrected on motion. *Bank of Commerce v. Smith*, 374.

The question of departure in the pleadings will not be considered on appeal if not raised in the trial court. *Whitney v. National M. A. Ass'n*, 472.

ARBITRATION AND AWARD.

Where all the orders of an award are to be performed by the same party, some of which are bad, and others well awarded the good will stand. *Bouck v. Bouck*, 490.

If the good relate to other parties than those to which the bad relate and the bad are the consideration for the good, then the whole must fail. *Id.*

ARBITRATION AND AWARD—Continued.

The judgment on a statutory award must conform to the award so far as it is valid. If the award be payable in installments, the judgment must also be so payable. *Id.*

ASSESSMENT INSURANCE. See **INSURANCE.**

ASSESSMENTS. See **TAXES AND ASSESSMENTS.**

ASSIGNMENTS OF ERROR. See **ERRORS, ASSIGNMENT OF.**

ASSIGNMENT IN TRUST FOR CREDITORS.

It is not error for the District Court to refuse to pass upon or allow an assignee's account until he turns over the assets to his successor. *In re State Bank*, 361.

In passing upon an assignee's account the Judge may use his own personal knowledge of what had been done by the assignee in the proceedings and of the general nature and extent of his services. *Id.*

Items allowed and disallowed. *Id.*

ATTACHMENT.

A finding of facts on affidavits presented upon a motion to vacate an attachment sustained. Defendant held to be a resident of this state. *Fitzgerald v. McMurran*, 312.

AWARD. See **ARBITRATION AND AWARD**, 490.

BAILMENT. See **PLEDGE**, 341.

BANKRUPTCY. See **INSOLVENCY.**

BANKS AND BANKING. See **AGENCY**, 33.

A state bank cannot directly or indirectly purchase shares of its own stock. If the bank contract with a third person to the effect that he shall purchase shares of its stock and hold them for its benefit, such contract is void. If the bank furnish the money to buy the stock and take his note for it, he must pay the note, the stock is his. *St. Paul & M. T. Co. v. Jenks*, 248.

An agent who deposits in bank money of his principal in his own name, thus, "A. J. Miller, Agent," cannot maintain an action for it in his own name after his agency ceases. *Miller v. State Bank of Duluth*, 319.

BILLS AND NOTES. See **PAYMENT**, 219; **BANKS AND BANKING**, 248.

A stipulation in a promissory note construed as authorizing the holder on default of payment of interest to declare the principal due for all purposes, and not merely for the purpose of foreclosing the mortgage security. *Lanpher v. Barnum*, 172.

In the case of a promise to accept nonexisting bills or drafts they must be drawn within a reasonable time thereafter, otherwise the promisee will be presumed to have declined to act on the promise. *Union Bank of Medina v. Shea*, 180.

The act of the bank in receiving and cashing such drafts in reliance on such promise is an acceptance of defendant's proposition and makes a binding contract. *Id.*

The reasonable presentation of such drafts to defendant for acceptance was all the notice that was required. *Id.*

BILLS AND NOTES—Continued.

Where one makes his several promissory note and three others sign on the back for his accommodation before its delivery, they are all joint and several makers. *Wolford v. Bowen*, 267.

Long said to Gieriet, "Give me your note so I can raise money on it." He gave it, he was indebted to Long on open account. It was not accommodation paper. *Long v. Gieriet*, 278.

A maker who wrote his name on the back of a note before its delivery cannot change his position to indorser by parol evidence that all parties agreed he should be indorser entitled to notice of nonpayment. *Dennis v. Jackson*, 286.

Evidence held sufficient to warrant a finding that the holder of a negotiable promissory note had notice of a defense at the time he purchased it. *Ward v. Johnson*, 301.

Laws 1883, ch. 114, provides that if a person without negligence sign a note, not knowing or believing it to be a note, he shall not be liable thereon. *Held*, this statute applies only when the maker believes he is not signing a negotiable instrument at all. *Yellow Medicine Co. Bank v. Tagley*, 391.

Proof of the purchase of a negotiable note for a valuable consideration before maturity, does not conclusively establish good faith and want of notice. *Id.*

It is no defense against an innocent holder in good faith for value before maturity, that a negotiable note left with the payee was not signed by all the parties who were to sign it before it was to be issued. *Id.*

The payee of a negotiable promissory note transferred it with the following indorsements, "Pay Elgin City Banking Co. (Signed.) Payment guaranteed. (Signed.)" *Held*, this is an indorsement under the law merchant. *Elgin City Banking Co. v. Zelch*, 487.

BOND ON APPEAL.

Extra-statutory language found in an appeal bond, given under 1878 G. S. ch. 86, § 10, *held* insufficient to warrant a recovery. *L. Kimball Print. Co. v. Southern L. Imp. Co.*, 37.

BONDS OF COUNTIES. See COUNTY COMMISSIONERS, 434.

BONDS OF THE CITY OF DULUTH. See DULUTH CITY CHARTER, 256.

BOOK ACCOUNTS. See EVIDENCE, 81.

BOUNDARIES OF LANDS. See EVIDENCE, 135, 245.

BREACH OF PROMISE OF MARRIAGE.

The record disclosed that plaintiff's conduct was throughout her connection with defendant as bad as his. *Held*, not a case for exemplary damages. *Clement v. Brown*, 314.

BROKER. See CONSTITUTIONAL LAW, 345.

The seller of a ticket for passage issued by a common carrier does not by the sale alone, undertake for anything beyond the genuineness of the ticket. *Elston v. Fieldman*, 70.

A broker is not entitled to commissions if no valid contract of sale is made. A person other than the vendee named in the contract for the sale of real estate cannot by parol acceptance of it as his own, make it a binding contract between himself and the vendor. *Harris v. McKinley*, 198.

CHALLENGE OF JUROR. See JUROR, 323.

CHARGE TO JURY.

A charge by the Judge regarding the measure of damages for taking exempt property construed. *Haugen v. Younggren*, 170.

A single exception to the refusal of the Judge to charge the jury as asked in two or more separate requests is unavailing, if any one request be unsound. *Webb v. Fisher*, 441.

CHATTEL MORTGAGE.

A lien on a crop by virtue of a note for the seed, under 1878 G. S. ch. 39. §§ 21, 22, has priority over a lien on the same crop under a previously executed chattel mortgage. *McMahon v. Lundin*, 84.

CLAIM AND DELIVERY. See REPLEVIN.

COMMISSION FOR SELLING REAL ESTATE. See BROKER, 198.

COMMON CARRIER. See BROKER, 70.

Laws 1893, ch. 66, to regulate the sale of passenger tickets issued by common carriers is valid. The incidents and accessories of the transportation business are subject to the police powers of the state. *State v. Corbett*, 345.

Laws 1893, ch. 60, requiring all passenger trains to stop at county seats, is valid, although such train carry United States mail. *State v. Gladson*, 385.

COMPLAINT. See PLEADING.

A complaint for goods sold and delivered which does not state by whom the goods were sold is bad on demurrer. *Pioneer Fuel Co. v. Hager*, 76.

CONDEMNATION PROCEEDINGS. See CONSTITUTIONAL LAW, 47.

CONSIDERATION.

Plaintiffs claimed that the widow of deceased promised to pay his debt to them and they promised to refrain from proving it against his estate. Their promise was not proved. Held, hers was without consideration and void. *Nelson v. Larson*, 133.

Long said to Gieriet, "Give me your note so I can raise money on it." He gave it, he was indebted to Long on open account. The note was not without consideration. *Long v. Gieriet*, 278.

CONSTITUTIONAL LAW.

An act to authorize construction of tunnels under navigable waters in cities held unconstitutional under Art. 4, § 33, because it adopts the special charter provisions of the city where such tunnel may be constructed for the condemnation of the land taken. *Alexander v. City of Duluth*, 47.

The title to Sp. Laws 1885, ch. 5, sufficiently expresses the subject of the act. *Kelly v. Minneapolis City*, 294.

This statute is constitutional although it provides for an assessment upon property benefitted by the change in street grades, but gives owners of the property no right to be heard as to who shall be appointed assessors, nor any right of appeal from such appointment. *Id.*

Laws 1893, ch. 66, entitled an act to regulate the sale and redemption of transportation tickets of common carriers and to provide punishment for the violation of the same is valid. *State v. Corbett*, 345.

CONSTITUTIONAL LAW—Continued.

It is not a grant of special privileges, or a delegation of police power, or an interference with interstate commerce, nor does it deprive anyone of his property without due process of law. *Id.*

Laws 1893, ch. 60, requiring railroad companies to stop all regular passenger trains at county seats, is a valid law. It is a reasonable regulation and does not interfere with interstate commerce. *State v. Gladson*, 385.

It is not void as to passenger trains carrying the United States mail. *Id.*

CONTRACTS. See CONSIDERATION, 133; TENDER, 175; BILLS AND NOTES, 180; SALES, 193, 377; VENDOR AND VENDEE, 198; RESCISSION OF CONTRACTS, 206.

A contract construed. *McCormick v. Milburn & Stoddard Co.*, 6; *McMullen v. Peoples' Sav. & L. Ass'n*, 33; *Minneapolis T. M. Co. v. Firemen's Ins. Co.*, 35; *Barge v. Scheik*, 155; *Hill v. Duluth City*, 231; *Twohy v. McMurran*, 242; *Kelly v. Minneapolis City*, 294; *In re Iron Bay Co.*, 338; *Cargill v. Thompson*, 534.

A stipulation that the principal debt may be declared due for nonpayment of semiannual interest, and collected by foreclosure of the security under a power, or in court or by suit or otherwise, construed and held to authorize suit on the note and upon a guaranty thereon. *Lanpher v. Barnum*, 172.

A contract to sell and deliver logs to defendant on or before April 10, 1891, upon the railroad right of way near Carlton convenient for loading onto cars, is performed by so delivering them and the title passes to the purchaser as soon as delivered. If then burned the loss is his. *Fredette v. Thomas*, 190.

In case the executory contract is ambiguous, the practical construction placed on it by the parties in executing it will be regarded the true construction. *Hill v. Duluth City*, 231.

The Iron Bay Company sold a band saw-mill agreeing to take it back if it proved unsatisfactory and in such event to pay \$1.60 per M. damages. Held, such damages were not payable unless the mill proved unsatisfactory. *In re Iron Bay Co.*, 338.

Where a building contract provides for damages for delay in completing the work, it does not apply if the delay be caused by the other party. *Davis v. Crookston W. P. & L. Co.*, 402.

Defendant subscribed for shares of stock in a corporation to be delivered when paid for. Held, the stocks must be tendered with demand for the unpaid balance of the subscription. *Walter A. Wood Harvester Co. v. Jefferson*, 456.

CONTRIBUTION AMONG SURETIES. See PRINCIPAL AND SURETY, 497.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE.

CONVERSION OF PERSONAL PROPERTY.

If a conversion was made prior to demand and refusal the jury may so find if the evidence warrants. *McLennan v. Minneapolis & N. E. Co.*, 317.

CORPORATIONS. See STOCK AND STOCKHOLDERS, 456, 552.

A judgment against a corporation and others jointly for the recovery of money is a debt of the corporation for the purpose of enforcing against

CORPORATIONS—Continued.

its stockholders, liability for unpaid subscriptions and their statutory liability. *Frost v. St. Paul B. & Invest. Co.*, 325.

The stockholder's statutory liability for debts of the corporation extends to debts contracted before he acquired his stock, and may be enforced by action although the corporation has assigned for the benefit of its creditors, and although the insolvency proceedings are still pending. *Olson v. Cook*, 552.

COSTS AND DISBURSEMENTS.

Statutory costs are allowed where a Justice of the Peace has not jurisdiction of the action. *L. Kimball Print. Co. v. Southern L. Imp. Co.*, 87.

An appeal held taken for delay and for that reason three per cent of the judgment is allowed respondent as additional costs. *Bardwell-Robinson Co. v. Brown*, 140.

Where several defendants in an action of tort in good faith appear by separate attorneys and interpose separate answers, each is entitled on a recovery to tax his bill of costs. *Slama v. Chicago, St. P., M. & O. Ry. Co.*, 167.

If a witness on request attend the trial but is not sworn because of unforeseen event at the trial, the party requesting him to attend may tax his fees as a witness. *Id.*

COUNTERCLAIM. See ANSWER, 395.

In an action by a trustee on a claim held by him for the *cestui que trust*, defendant cannot setoff a claim held by him against the trustee. *Village of West Duluth v. Norton*, 72.

Insolvency held an equitable ground for counterclaim of a demand not due, against a demand in the hands of an assignee in trust for creditors. *St. Paul & M. Trust Co. v. Leck*, 87.

COUNTY COMMISSIONERS.

The board has no power to cancel personal taxes until the sheriff's return and affidavit is delivered to it showing them uncollectible. *Grundysen v. Polk Co.*, 212.

The board of county commissioners has no power to incur liability for the county which with the ordinary current expenses will require a tax levy exceeding five mills on the dollar. *Rogers v. Le Sueur Co.*, 434.

The board in such case cannot anticipate an unusual payment of uncollected delinquent taxes or more than one year's future taxes assessed at the maximum rate. *Id.*

The board has no power to issue bonds for the construction of a court house. *Id.*

COUNTY DEBTS. See COUNTY COMMISSIONERS, 434.**COUNTY TREASURER.**

Pending proceedings to remove a county treasurer under Laws 1881, ch. 108, he may resign but is not eligible for reappointment until acquitted. The proceedings are not terminated by the resignation. *State ex rel. v. Dart*, 261.

COURT HOUSE. See COUNTY COMMISSIONERS, 434.**CRIMINAL LAW. See ADULTERY, 225; RAPE, 482.**

CROPS OF GROWING GRAIN. See SEEDGRAIN NOTE, 84.

CUSTOM AND USAGE.

A custom or usage of trade to be valid must be uniform, certain and not optional with those to whom it applies. The habit of agents to renew expiring policies of insurance is not such custom. *Nippolt v. Firemen's Ins. Co.*, 275.

DAMAGES. See ROADS AND STREETS, 9; LANDLORD AND TENANT, 278.

If mortgaged chattels be taken by a stranger from the possession of a mortgagor and converted he may recover of such stranger their full value undiminished by or on account of the mortgage. *Vandiver v. O'Gorman*, 64.

Defendant agreed to buy land of plaintiff when his title should be perfected under a foreclosure. Defendant afterwards refused to perform, held plaintiff was entitled to substantial, not merely nominal, damages for breach of the contract. *Conrad v. Dobmeier*, 147.

In an action against a sheriff for taking on execution grain exempt by statute, no case was made for the recovery of either special or exemplary damages. *Haugen v. Younggren*, 170.

In an action for a breach of promise of marriage the record disclosed that plaintiff's conduct throughout her connection with defendant was as bad as his. Held not a case for exemplary damages. *Clement v. Brown*, 314.

Where a building contract provides for damages for delay in completing the work, it does not apply if the delay be caused by the other party. *Davis v. Crookston W. P. & L. Co.*, 402.

An alley twenty feet wide running through a block in St. Paul from street to street was obstructed at one end by a railroad roundhouse. Held, owners of lots abutting on the alley sustained special damages from the obstruction, not common to the general public. *Kaje v. Chicago, St. P., M. & O. Ry. Co.*, 422.

The right of lateral support of land from the adjacent soil is an absolute right of property. If the adjacent soil be removed the measure of the damages is the diminution of the market value of the plaintiff's property. *Schultz v. Bower*, 493.

One exposed to injury through the default of another must use ordinary care and reasonable precaution to lessen the damages. This rule does require him to perform the duties of that other in the premises. *Cargill v. Thompson*, 534.

Upon a breach of covenant to furnish a specified water power to propel a flouring mill, the lessee on failure may recover as damages the profits he would have made in manufacturing flour if the covenant for water had not been broken. *Id.*

DEATH FROM NEGLIGENCE. See PLEADING, 126.

DECEDENT'S ESTATES. See ADMINISTRATION OF, 21.

An estate having been fully administered and the real estate assigned to B. F. as sole heir and the administrator discharged, a will was found devising the real estate to others and was presented and admitted to probate and an administrator appointed to execute it. Held, the last administrator could not obtain a revocation of the former decree assigning the real estate to B. F. or sell any of the real estate to pay his fees and expenses of the second administration. *In re Thompson's Estate*, 109.

DECEDENT'S ESTATES—Continued.

The statute of limitation of actions does not begin to run against a promise to pay out of the promisor's estate until after the death of the promisor. *In re Hess' Estate*, 282.

DEED OF LANDS. See EVIDENCE, 245; PRIVACY IN ESTATE, 534.

The description of land in a deed read "and thence east to the shore of Lake St. Croix, thence northerly along the lake shore to Chestnut Street, thence west, &c." Held to convey all the riparian rights of the grantor. *Castle v. Elder*, 289.

Oral evidence of what was said or done at or before the execution of a deed of land cannot be received in the absence of fraud or mistake to alter the legal effect of the deed. *Id.*

The test of the mental capacity of a grantor to make a deed is the same as that applicable in case of wills. *Young v. Otto*, 307.

A deed may be reformed to effectuate the intent of the parties although it is written in the very terms they intended it should be, if they were in error in respect to the thing to which the terms applied. *Crookston Imp. Co. v. Marshall*, 333.

If there be mistake on one side and fraud on the other such deed may be reformed. *Id.*

A quitclaim deed of husband and wife will bar the dower or inheritance of the wife in his land previously sold on a writ of execution against his property. *Ortman v. Chute*, 452.

DEPOSITIONS AS EVIDENCE.

A deposition taken pursuant to 1878 G. S. ch. 73, § 36, as amended by Laws 1885, ch. 53, cannot be read in evidence until it is shown that a cause existed and still exists for taking it. *Davidson v. Sherburne*, 355.

DISTRICT COURT. See HENNEPIN COUNTY DISTRICT COURT, 361.**DOWER.**

A quitclaim deed of husband and wife will bar the dower or inheritance of the wife in his land previously sold on a writ of execution against his property. *Ortman v. Chute*, 452.

DUE PROCESS OF LAW. See CONSTITUTIONAL LAW, 345.**DULUTH CITY CHARTER.** See CONSTITUTIONAL LAW, 47.

The city charter, Sp. Laws 1887, ch. 2, subch. 9, § 9, as amended by Sp. Laws 1891, ch. 55, § 35, construed to allow the city authorities to issue water and light bonds in excess of five (5) per cent of the assessed valuation of the taxable property in the city. *Woodbridge v. Duluth City*, 256.

Whether reasonable time has elapsed in a given case may be a question of law, but on the facts stated in this action it is one of fact not to be disposed of on demurrer to the complaint. *Id.*

DULUTH MUNICIPAL COURT.

This court has no jurisdiction of an action where the sum claimed in the complaint including interest exceeds \$500. *Crawford v. Hurd Refrigerator Co.*, 187.

ELECTION CONTEST.

Evidence held insufficient to sustain contestant's claim to election as Superintendent of Schools in Ramsey County. *Blake v. Hogan*, 45.

EMINENT DOMAIN. See CONSTITUTIONAL LAW, 47.**ERRORS, ASSIGNMENT OF.**

An assignment of error not included in the points relied on, will be deemed abandoned. *Johnson v. Johnson*, 100.

The assignments of error held too general, not specifying the particular fact found or ruling made, which appellant deems erroneous. *Lytle v. Prescott*, 129.

ESTOPPEL. See AGENCY, 104, 499.

Where a thing is sold for cash, but a check is accepted, and the property and an absolute bill of sale of it are delivered, but the check afterwards turns out to be worthless, the seller is estopped from asserting that the delivery was conditional as against a subvendee who bought in good faith for value in reliance on the vendee's muniments of title. *Cochran v. Stewart*, 499.

ESTRAYS.

The owner of a cow allowed her to run at large, knowing the railroad in the vicinity to be unfenced; held, this did not necessarily prevent his recovery of damages from the railroad company for negligently killing the cow on its track. *Bricson v. Duluth & Iron Range R. Co.*, 26.

EVIDENCE. See RES JUDICATA, 100; PRACTICE, 307, 519; WITNESS, 317; JUDGMENT, 325; DEPOSITIONS AS EVIDENCE, 355; RAPE, 482.

A writing which a witness may inspect to refresh his recollection must be one which enables him after its inspection to tell the facts from his own recollection of them. *Douglas v. Leighton*, 81.

The evidence must follow the pleadings and be pertinent to the issue. *Register Print. Co. v. Willis*, 93.

Declarations of the holder in disparagement of his title to a note, made while it was in his hands, are evidence against those in privity with him. *Taylor v. Hess*, 96.

On an issue as to which of the parties to a note was the principal debtor and which the surety, evidence of the partnership relations of the parties was relevant. *Lillyblad v. Sawyer*, 130.

The rule admitting evidence of common repute on the question of boundaries applies to the boundaries established by the United States surveys, where the monuments set in making those surveys have disappeared. *Thoen v. Roche*, 135.

The statements of a section boss on a railroad as to the value of stock negligently killed, are not evidence against the railroad company in a suit for its value. *Holverson v. Chicago, M. & St. P. R. Co.*, 142.

Upon a charge of adultery the testimony of the injured husband or wife is competent to prove the offense. *State v. Volland*, 225.

The evidence of the location of a road mentioned in a deed as one of the boundaries of the land conveyed, examined and held to support the finding. *Yanish v. Tarbox*, 245.

The plaintiff on cross examination stated a part of the conversation of the testator. She did this in answer to questions asked by the executors. On redirect examination she was entitled to state the whole of the conversation and thereby prove a contract with deceased to pay her wages. *In re Hess' Estate*, 282.

EVIDENCE—Continued.

Prior contradictory statements do not necessarily discredit a witness. The effect of the evidence is for the jury. *Id.*

A maker who wrote his name on the back of a promissory note before delivery cannot show by parol that he was by agreement of all concerned to be indorser and not maker. *Dennis v. Jackson*, 286.

Oral evidence of what was said or done at or before the execution of a deed of land cannot be received in the absence of fraud or mistake, to alter the legal effect of the deed. *Castle v. Elder*, 289.

In an action for conversion of personal property evidence of its value a week or ten days before, is ordinarily competent. *McLennan v. Minneapolis & N. E. Co.*, 317.

The affidavit and proof of the signature of the deponent thereto, and of the officer to the jurat thereon, are evidence on the trial of the deponent for perjury that he swore to the affidavit. *State v. Madigan*, 425.

Competent evidence to prove the perjury is not rendered incompetent because it also tends to prove the accused to be guilty of another crime. *Id.*

Certain statements of a prosecutrix contradictory of her evidence held competent without first calling her attention to them. *State v. Connelly*, 482.

What jurors see or learn when sent by the court to view the premises, is not evidence in the case. *Schultz v. Bower*, 493.

Statements of an agent of defendant are not evidence unless made within the scope of his agency. *Colby v. Life Indemnity & Inv. Co.*, 510.

EXCEPTION. See CHARGE TO JURY, 441.

For errors of law occurring upon the trial but not excepted to, a new trial cannot be granted. *Valerius v. Richard*, 443.

EXECUTORS AND ADMINISTRATORS.

The expense of hunting up the next of kin of the deceased cannot be allowed as a part of the expense of the administration of his estate. *In re Glynn's Estate*, 21.

An estate having been fully administered and the real estate assigned to B. F. as sole heir and the administrator discharged, a will was found devising the real estate to others and was presented and admitted to probate and an administrator appointed to execute it. Held, the last administrator could not obtain a revocation of the former decree assigning the real estate to B. F. or sell any of the real estate to pay his fees and expenses of the second administration. *In re Thompson's Estate*, 109.

EXEMPT PROPERTY; FROM LEVY AND SALE ON EXECUTION. See DAMAGES, 170.**FEES. See SHERIFF'S FEES, 212, 216; ASSIGNMENT IN TRUST FOR CREDITORS, 361.****FELLOW SERVANTS. See MASTER AND SERVANT, 365.****FINDINGS.**

Supported by the evidence. *Lillyblad v. Sawyer*, 130; *Union Bank of Medina v. Shea*, 180; *Rogers v. Brown*, 223; *Yanish v. Tarbox*, 245; *Young v. Otto*, 307; *Fitzgerald v. McMurran*, 312; *Davis v. Crookston W. P. & L. Co.*, 402; *In re Shea*, 415; *Whitney v. National M. A. Ass'n*, 472; *Cochran v. Stewart*, 499.

FINDINGS—Continued.

Findings of facts based on conflicting affidavits, presented to the court on a motion, are conclusive if there be any evidence in such affidavits sustaining the findings. *State v. Madigan*, 425.

FIXTURES.

A mantel, grate and tiling were set up by a tenant in a dwelling house which his landlord had mortgaged and the mortgage had been foreclosed by sale; held, the mantel, grate and tiling might be removed by the tenant. *Pioneer Saving & L. Co. v. Fuller*, 60.

If the owner of a small frame house standing on runners upon the land of another fails to remove it within a reasonable time after he is ejected from the land, it becomes part of the realty and the property of him who owns the land. *Turner v. Kennedy*, 104.

FORECLOSURE. See **PLEDGE**, 341; **REDEMPTION FROM SALE**, 465.

FRAUD. See **RESCISSION OF CONTRACT**, 206; **REFORMATION OF WRITTEN INSTRUMENT**, 333; **BILLS AND NOTES**, 391.

To obtain an antedated policy of insurance against fire immediately after a loss by fire on the property insured, without disclosing such loss is a fraud upon the insurer and the contract is voidable at his election. *Nippolt v. Firemen's Ins. Co.*, 275.

FRAUDS, STATUTE OF. See **LEASE**, 18; **SALES**, 234.

GRANTOR AND GRANTEE.

A mortgagee in possession is not in privity of estate with the lessee of the mortgagor so as to make him liable on the covenants in the lease. This is so, although the mortgage be a deed absolute with parol defeasance. *Cargill v. Thompson*, 534.

Nor is the grantee of the rents issuing from the demised premises in such privity, if the grant be merely as security for the payment of a debt. *Id.*

GUARANTY.

A letter to plaintiff saying, if you desire to give Baker a credit of \$250 for goods I will be responsible for such amount, is not a continuing guaranty. Defendant having once paid that amount on Baker's account was discharged. *Twohy v. McMurran*, 242.

HENNEPIN COUNTY DISTRICT COURT.

Where two of the Judges sitting together disagree in opinion, that of the Judge senior in office is the opinion of the court. *In re State Bank*, 361.

HIGHWAY. See **ROADS AND STREETS**.

HUSBAND AND WIFE.

Upon a charge of adultery the testimony of the injured husband or wife is competent to prove the offense. *State v. Volland*, 225.

A quitclaim deed of husband and wife will bar the dower or inheritance of the wife in his land previously sold on a writ of execution against his property. *Ortman v. Chute*, 452.

INDICTMENT. See **PERJURY**, 425.

INDORSEMENT. See **BILLS AND NOTES**, 286.

Dunham the payee named in a negotiable promissory note transferred it before due with the following indorsement, "Pay the Elgin City Banking Co. D. Dunham. Payment guaranteed. D. Dunham." Held this was an indorsement and the Banking Co. an indorsee under the law merchant. *Elgin City Banking Co. v. Zelch*, 487.

INJUNCTION.

Proceedings to assess a special tax for benefits conferred by a public improvement cannot be enjoined by the property holder on the ground of irregularity therein where other adequate remedy is provided. *Kelly v. Minneapolis City*, 294.

County Commissioners may be restrained from illegally issuing bonds to build a courthouse. *Rogers v. LeSueur Co.*, 434.

INSOLVENCY. See **ASSIGNMENT IN TRUST FOR CREDITORS**, 361; **STOCK AND STOCKHOLDERS**, 552.

Evidence held to show a debtor (not a trader) to be insolvent within the meaning of the insolvency statute. *In re Bissell*, 78.

Insolvency held an equitable ground for setoff of a demand not due, against a demand in the hands of an assignee in trust for creditors. *St. Paul & M. Trust Co. v. Leck*, 87.

A collusive sale of the insolvent's property made by the receiver to the wife of the insolvent or a third party for his benefit is fraudulent and void as to the creditors and the receiver is chargeable in his account with the full value of the property so sold. *In re Shea*, 415.

An *ex parte* order confirming such sale may be set aside by direct proceeding for that purpose. *Id.*

All the creditors are entitled to share in the money realized by the proceeding against the receiver. *In re Shotwell*, 49 Minn. 170, explained. *Id.*

INSOLVENT CORPORATIONS. See **CORPORATIONS**.

INSURANCE. See **POLICY OF INSURANCE**, 35.

No usage or custom to renew expiring fire insurance was established by the evidence as to such custom in St. Paul. *Nippolt v. Firemen's Ins. Co.*, 275.

Antedated policy obtained immediately after a fire without disclosing that fact, held voidable for fraud. *Id.*

An insurance solicitor is the agent of the insurer, not of the person insured. *Whitney v. National M. A. Ass'n*, 472.

This is so in the case of a mutual benefit association insuring against personal injury by accident. *Id.*

Where by reason of misrepresentations and unauthorized acts of the insurer the assured is misled and induced to refrain from paying the premiums which he otherwise would have paid, he is entitled, if living, to have his policy reinstated; if dead, the beneficiary can recover on it upon paying all premiums due. *Colby v. Life Indemnity & Inv. Co.*, 510.

But an illegal assessment is not alone a sufficient excuse for nonpayment of premiums. *Id.*

An absolute denial of all liability and a refusal to pay are a waiver of the time given after proof of loss in which to pay; and suit may be brought at once. *Hand v. National Live Stock Ins. Co.*, 519.

INTERSTATE COMMERCE. .See CONSTITUTIONAL LAW, 345.

INTOXICATION. See JUROR, 425.

JANITOR. See OFFICER, 1.

JUDGMENT. See RES JUDICATA, 148; PRACTICE, 251, 267: ARBITRATION AND AWARD, 490.

A domestic judgment on the merits is conclusive between the parties upon the issues involved and actually determined in the first action. *Johnson v. Johnson*, 100; *Mitchell v. Chisholm*, 148.

In replevin where the property is delivered to the plaintiff and the defendant obtains a verdict the judgment must be in the alternative for a return of the property or for its value if a return cannot be had. *French v. Ginsberg*, 264.

Where, in an action on a joint and several note signed by four makers, a several judgment was entered on default against two of them and afterwards a second judgment against a third maker, and the court on motion by him to vacate the last sanctioned the practice, both judgments are valid. *Wolford v. Bowen*, 267.

A judgment for the recovery of money is as against everybody evidence of a debt from and after the time of its rendition. *Frost v. St. Paul B. & Invest. Co.*, 325.

Judgment may be entered against one of several parties defendant, if the debt be the several debt of each, without waiting for the trial of the issues with the other defendants. *Bank of Commerce v. Smith*, 374.

JUDICIAL SALE. See PLEDGE, 341; INSOLVENCY, 415.

JURISDICTION.

The municipal court of Duluth is given jurisdiction if the amount claimed does not exceed \$500. In ascertaining the amount interest is to be included. *Crawford v. Hurd Refrigerator Co.*, 187.

JUROR.

Misconduct of jurors who by consent of both parties are subsequently dismissed from the jury, is no ground for granting a new trial. *Young v. Otto*, 307.

When a challenge of a juror for actual bias is, by consent, tried by the Judge presiding, his finding is conclusive. *Hawkins v. Manston*, 323.

When a juror drinks intoxicating liquor during a trial for felony, but not after retiring to consider of the verdict, the presumption is against the validity of the verdict rendered, but such presumption may be overcome by proof that the juror was not intoxicated. *State v. Madigan*, 425.

After verdict it is too late for the accused to object that one of the jurors did not understand the English language and to ask to have the verdict set aside on that ground. *Id.*

What the jurors see or learn when sent to view the *locus in quo* is not evidence in the case. *Schultz v. Bower*, 493.

JUSTICE'S COURT.

The application to remove a cause to another Justice must be made before the trial is moved and the jury have appeared in obedience to the venire. *Lueck v. St. Paul & Duluth R. Co.*, 30.

JUSTICE'S COURT—Continued.

After the trial was commenced before a jury the case was adjourned six days. Defendant objected, but took no exception. He appeared on the day to which the case was adjourned and took part in the trial. Held, the error if any was waived. *Mead v. Sanders*, 108.

LACHES. See AGENCY, 104.

LANDLORD AND TENANT. See FIXTURES, 104; LEASE, 155.

Landlord held not liable for expenses incurred by his tenant in doing business while access by railway was temporarily suspended through no fault of his. *McCormick v. Milburn & Stoddard Co.*, 6.

A lease void under the statute of frauds will regulate the terms as to rent if the tenant enters and occupies the premises. *Steele v. Anheuser-Busch Brewing Ass'n*, 18.

A tenancy at will from month to month, rent payable monthly, can only be terminated by one month's notice. *Eastman v. Vetter*, 164; *Shirk v. Hoffman*, 230.

Notice by the tenant that he surrenders possession on the day on which the notice is given will not terminate the tenancy on the expiration of a month from that time. *Id.*

Evidence held to warrant a finding that a lease from year to year was changed to one from month to month and terminable by a month's notice. *Rogers v. Brown*, 223.

If a tenant rent the premises for one month, but holds over and pays rent without any new agreement, he becomes a tenant from month to month and a month's notice is necessary to end the tenancy. *Shirk v. Hoffman*, 230.

Where the landlord agreed to make certain improvements on the demised premises but failed to do so, the tenant in possession is not thereby relieved from payment of the rent. *Long v. Gieriet*, 278.

In such case the tenant is entitled as damages to the difference in rental value of the premises, with, and without, the improvements. *Id.*

Consent by the landlord that the tenant assign his lease to a third party and deliver to him possession of the premises, does not release the tenant from his obligation to pay the rent. *Rees v. Lowy*, 381.

Surrender of the lease by operation of law cannot be implied from the mere fact that the lessor assented to the assignment of the lease, and subsequently collected rent from the assignee in possession. *Id.*

LAND SURVEYS. See EVIDENCE, 135, 245.

LATERAL SUPPORT OF SOIL.

The right to lateral support of land from adjacent soil is an absolute right of property. The right to damages for removal of such support does not depend on negligence. *Schultz v. Bower*, 493.

LEASE. See LANDLORD AND TENANT, 381; PRIVACY IN ESTATE, 534.

A lease of a warehouse with railway access construed and held that landlord is not liable for damages occasioned by interruption of access by cars not caused by his fault. *McCormick v. Milburn & Stoddard Co.*, 6.

A lease void under the statute of frauds will nevertheless regulate the terms as to rent if the tenant enters and occupies under it. *Steele v. Anheuser-Busch Brewing Ass'n*, 18.

LEASE—Continued.

A lease provided that the tenant should have the privilege to renew for another term of five years. But during the first term he surrendered a part of the leased premises. Held, he thereby lost the right of renewal. *Barge v. Schiek*, 155.

A covenant in a lease of a mill and waterpower to furnish a specified amount of water gives the lessee the right to that amount and he may put in additional machinery to utilize it. *Cargil v. Thompson*, 534.

LIBEL.

A newspaper article stating that the writer of a previous article would, if in public office, plunder the people, and in business swindle his creditors, is a libel. *Dressel v. Shipman*, 23.

Such previous article cannot be received in mitigation without proof of plaintiff's agency in publishing it. *Id.*

LIENS. See MECHANIC'S LIENS; SEEDGRAIN NOTE, 84.

LIMITATION OF ACTIONS.

Proceedings to enforce the collection of taxes against real estate are "an action upon a liability created by statute" within 1878 G. S. ch. 66, § 6, and barred in six years. *Pine Co. v. Lambert*, 203.

The statute does not begin to run against a promise to pay out of the promisor's estate until after the death of the promisor. *In re Hess' Estate*, 282.

A partial payment by one of a firm that contracts the debt, made after dissolution of the firm, will prevent the bar of the statute as to the other partners if the creditor had no notice of the dissolution. *Davison v. Sherburne*, 355.

MAIL.

Passenger trains carrying United States mail may be required by state statute to stop at all county seats. *State v. Gladson*, 335.

MARKET VALUE.

In an action for conversion of personal property, evidence of its value a week or ten days before the conversion is ordinarily competent. *McLennan v. Minneapolis & N. E. Co.*, 317.

A farmer is presumed to know so that he can testify to the market value of crops such as he raises and sells. *Id.*

MARRIAGE. See BREACH OF PROMISE OF MARRIAGE, 314.

MASTER AND SERVANT. See NEGLIGENCE, 237, 271; PAYMENT, 395.

In an action by a servant against his master for personal injuries received in using his master's trip-hammer in disrepair, he is not required to point out the precise defect in it. *Nelson v. St. Paul Plow Works*, 43.

A boy servant fifteen years old was employed to attend his master's carding machines. He was injured and claimed he was not warned of, or instructed to avoid, the danger. Held, on the evidence he was guilty of contributory negligence. *Truntle v. North Star Woolen Mill Co.*, 52.

A workman on a railroad bridge fell from it because the master's jackscrew he was using was defective. He had laid aside the lever and used one much longer; held, the questions of negligence and contributory negligence were for the jury. *Kennedy v. Chicago, M. & St. P. Ry. Co.*, 227.

MASTER AND SERVANT—Continued.

The springs under the box of a delivery wagon were flattened down by heavy usage, so that the front wheels in turning would not go under the box. The driver on request of his master consented to use it for the day, both knowing its condition. He was injured by its overturning. Held, the master was liable to the servant for his damages. *Schlitz v. Pabst Brewing Co.*, 303.

A railroad employee repairing the telegraph line and quarry men getting out rock to repair the track were under the circumstances fellow servants and the master not liable for the injury to one by the negligence of the others. *Neal v. Northern Pac. R. Co.*, 365.

The servant gave notice of defect in the machines placed in his charge and was told the defect would be remedied. He continued in the service and was injured. Held, the master is liable to him for the injury. *Rothenger v. Northwestern Con. M. Co.*, 461.

The notice is sufficient if it can be fairly inferred that the servant is complaining on his own account and that he was induced to continue in the service by the promise to repair. *Id.*

Reasonable time in which to repair is a question of fact for the jury. *Id.*

MEASURE OF DAMAGES. See DAMAGES.

MECHANIC'S LIENS.

Although a contractor assign his claim as security for money borrowed, but in form absolute, he can make and file a lien statement and foreclose it, the assignee being made, or becoming, a party to the action. *Davis v. Crookston W. P. & L. Co.*, 402.

If the sale of the claim is absolute the contractor cannot afterward make or file a lien statement. Nor will his attempt to do so inure to the benefit of his assignee. *Id.*

It is competent to show by parol evidence that an assignment absolute in terms was made as collateral security for a debt. *Id.*

Allegations in the answer, under this lien statute are deemed controverted without a reply. *Id.*

The facts found held not to justify a judgment that the sum due is a lien on the property. *Id.*

MENTAL CAPACITY TO MAKE A DEED. See DEED OF LANDS, 307.

MILEAGE. See SHERIFF'S FEES, 212.

MINNEAPOLIS CITY CHARTER.

The charter of Minneapolis City imposes upon the property benefitted the obligation of paying the damages to owners of buildings, caused by a change of the grade of a street at a railroad crossing. Neither the charter of the St. Paul M. & M. Ry. Co. nor that of the Minneapolis & St. L. Ry. Co. imposes this duty on them. *Kelly v. Minneapolis City*, 294.

A contract of settlement made between the city and these railroads, does not relieve the property benefitted, from liability for such damages. *Id.* Such contract construed and the objections of owners of property assessed to pay the benefits, considered. *Id.*

MISTAKE OF FACT. See REFORMATION OF WRITTEN INSTRUMENT, 333.

MORTGAGE. See CHATTEL MORTGAGE, 84.

MORTGAGOR AND MORTGAGEE. See **FIXTURES**, 60; **ACCOUNT STATED**, 67; **REDEMPTION FROM SALE**, 465; **PRIVITY IN ESTATE**, 534.

A stipulation that on failure to pay interest the principal might be declared due, construed and held to authorize a suit at law for the entire debt. *Lanpher v. Barnum*, 172.

MOTION AND ORDER. See **PRACTICE**.

An ex parte order confirming a sale of property by a receiver in insolvency is not conclusive and may be set aside on notice and motion for that purpose. *In re Shea*, 415.

MUNICIPAL CHARTERS. See **CONSTITUTIONAL LAW**, 47; **VILLAGE INCORPORATION**, 526.

MUNICIPAL CORPORATIONS. See **ORDINANCE**, 14; **COUNTERCLAIM**, 72.

In the control and improvement of its streets a municipal corporation has the same rights and powers as a private owner has over his own land, and as to abutting owners is subject to the same liabilities. *Munger v. City of St. Paul*, 9.

Alteration of established grade, evidence as to. *Id.*

A municipal corporation is liable for an injury caused by an unsafe condition of a sidewalk, although the defect exists in the plan of the walk, if there be no necessity for the defect. *Blyhl v. Village of Waterville*, 115.

In *Laws 1885*, ch. 145, § 3, for the incorporation of villages the words "lands adjacent thereto" allow only those lands to be included which lie so near the center of population as to be suburban in character and have a community of interest with the platted portion. Large tracts of rural territory cannot be included. *State ex rel. v. Minnetonka Village*, 526.

MUNICIPAL COURTS. See **PLACE OF TRIAL**, 30.

The municipal court of Duluth is given jurisdiction when the amount claimed does not exceed \$500. Held, this includes interest as well as principal. *Crawford v. Hurd Refrigerator Co.*, 187.

MUNICIPAL INDEBTEDNESS. See **DULUTH CITY CHARTER**, 256.

MUTUAL ASSESSMENT INSURANCE. See **INSURANCE**.

MUTUAL BENEFIT ASSOCIATIONS.

The solicitor of insurance in a mutual benefit association is, while obtaining members the agent of the association and not of the person insured. *Whitney v. National M. A. Ass'n*, 472.

NEGLIGENCE. See **MASTER AND SERVANT**, 43, 52, 227, 461; **DAMAGES**, 534.

The owner of a cow allowed her to run at large, knowing the railroad in the vicinity to be unfenced; held, this was not necessarily contributory negligence preventing a recovery of damages from the railroad company for negligently killing the cow on its track. *Ericson v. Duluth & Iron Range R. Co.*, 26.

If a servant fails to realize the magnitude of the danger pointed out, or forgets it and negligently exposes himself, his failure or forgetfulness will not excuse his contributory negligence. *Trunlle v. North Star Woolen Mill Co.*, 52.

NEGLIGENCE—Continued.

A common laborer at work for a railroad company in a ditch ten or twelve feet distant from the railroad tracks went without orders onto the track and was struck and killed. Held, he was guilty of contributory negligence. *Rutherford v. Chicago, M. & St. P. Ry. Co.*, 237.

Where a section man is at work dangerously near the railroad track and is hit by a passing train, it is a question of fact for the jury whether the master was negligent in failing to give him warning of the train's approach. *Schultz v. Chicago, M. & St. P. Ry. Co.*, 271.

The springs under the box of a delivery wagon were flattened down by heavy usage so that the front wheels in turning would not go under the box. The driver on request of his master consented to use it for the day, both knowing the defect. He was injured by its overturning. Held, the master was liable. *Schlitz v. Pabst Brewing Co.*, 303.

A boy thirteen years old got on the steps of a passenger car in an outgoing train and rode a short distance. In dropping off he fell under the train and was killed. Held, the railroad company was not, but the boy was, guilty of negligence. *Powers v. Chicago, M. & St. P. Ry. Co.*, 332.

A railroad employee engaged in repairing the telegraph line upon a sidehill was injured by a stone set in motion by the negligence of other servants blasting out rock to repair the track. Held, they were fellow servants and the railroad company not liable for the injury. *Neal v. Northern Pac. R. Co.*, 365.

NEGOTIABLE PAPER. See BILLS AND NOTES.

NEW TRIAL.

The action of the trial court in granting or refusing a new trial upon conflicting evidence will not be reversed on appeal unless manifestly against the preponderance of the evidence. *Hoffman v. Meyer*, 25.

Under issues entitling plaintiff to substantial damages if found in his favor, a verdict for him for one dollar may be set aside for inadequate damages. *Conrad v. Dobmeier*, 147.

Where the preponderance of the evidence is manifestly and palpably in favor of the verdict, an order granting a new trial for insufficiency of evidence to sustain the verdict, will be reversed. *James H. Bishop & Co. v. Buckeye Pub. Co.*, 219.

Misconduct of jurors who by consent of both parties are subsequently dismissed from the jury is no ground for granting a new trial. *Young v. Otto*, 307.

For errors of law occurring upon the trial but not excepted to, a new trial cannot be granted. *Valerius v. Richard*, 443.

NOTES AND BILLS. See BILLS AND NOTES.

NOTICE TO END REDEMPTION FROM TAX JUDGMENT SALE.
See TAX TITLES TO LANDS, 397.NOTICE TO END TENANCY AT WILL. See LANDLORD AND TENANT,
164.

NUISANCE.

A railroad round house and machine shop built upon an alley and entirely obstructing it at one end is a nuisance occasioning special damage to the owners of lots abutting upon the alley. *Kaje v. Chicago, St. P., M. & O. Ry. Co.*, 422.

NUISANCE—Continued.

Smoke, dirt and soot issuing from such round house and adjacent machine shop in the prosecution of a lawful business do not render the business unlawful. *Id.*

OATH.

On the trial of one accused of perjury in swearing to an affidavit, the affidavit itself and proof of the signature of the accused thereto and of the officer to the jurat thereon are evidence that the accused made oath to it. *State v. Madigan*, 425.

OFFICER. See **COUNTY TREASURER**, 261.

The committee having charge of the combined court house and city hall in the City of St. Paul has no power to appoint a janitor or custodian of the building for a period of time extending beyond the year for which they are themselves appointed. *Egan v. City of St. Paul*, 1.

OPENING JUDGMENT. See **MOTION AND ORDER**, 415.

After judgment on default, defendant on excusing his default may be permitted to contest the amount of damages although denied other relief. *Jones v. Swain*, 251.

ORDINANCE.

One part of a statute or ordinance may stand though another part be void, if the void part be not essential to the valid. *Village of Wyckoff v. Healey*, 14.

OVERPAYMENT. See **PAYMENT**, 395.**PARTIES TO ACTIONS.**

An agent who deposits in bank the money of his principal in his own name thus, "A. J. Miller, Agent," cannot maintain an action for it in his own name after his agency ceases. *Miller v. State Bank of Duluth*, 319.

PARTNERSHIP.

A partial payment by one of the partners made after dissolution will prevent the bar of the statute of limitations as to other partners if the creditor has no notice of the dissolution. *Davison v. Sherburne*, 355.

PASSAGE TICKET. See **BROKER**, 70.**PAUPERS.** See **POOR**, 145.**PAYMENT.** See **PRACTICE**, 267; **LIMITATION OF ACTIONS**, 355.

The facts considered and held to be payment instead of a transfer of the notes in suit. *James H. Bishop & Co. v. Buckeye Pub. Co.*, 219.

Where a travelling salesman is paid by his employers upon account more than is due him at the time of payment, the excess is not a gift but must be accounted for on final settlement. *Farrell v. Burbank*, 395.

PAYMENT BY CHECK. See **ESTOPPEL**, 499.**PERJURY.**

A statement in an affidavit for an attachment, that the deponent is the attorney for the plaintiff, is a material statement and if false is perjury. *State v. Madigan*, 425.

PERJURY.—Continued.

In such case the indictment need not allege that the deponent was in fact an attorney at law or state that the false statement was material if the facts alleged show it to be. *Id.*

PERSONAL INJURY. See NEGLIGENCE; RAILROADS; MASTER AND SERVANT.

Servant's hand injured in master's triphammer out of repair. *Nelson v. St. Paul Plow Works*, 43.

Servant-boy fifteen years old had his left arm injured in one of his master's carding machines. He claimed his master did not properly warn him of the danger and instruct him how to avoid it. *Truntle v. North Star Woolen Mill Co.*, 52.

Traveler on a sidewalk at night was injured by falling over an unnecessary step in the walk. *Blyhl v. Village of Waterville*, 115.

Brakeman on freight train fell from a car of cord wood because it was improperly loaded. *Rogers v. Truesdale*, 126.

Workman upon railroad bridge fell from it because of a defect in a jack-screw he was using. *Kennedy v. Chicago, M. & St. P. Ry. Co.*, 227.

A laborer at work for a railroad company in a ditch ten or twelve feet from the track needlessly went upon the track and was struck by a passing train. *Rutherford v. Chicago, M. & St. P. Ry. Co.*, 237.

A section man at work dangerously near the railroad track was hit by a passing train. *Schulz v. Chicago, M. & St. P. Ry. Co.*, 271.

Wagon overturned and driver thrown out and injured because springs flattened down and box settled so that front wheels struck it in turning. *Schlitz v. Pabst Brewing Co.*, 303.

Boy at a railroad station rides on the car steps of outgoing train a short distance and in dropping off falls under the car. *Powers v. Chicago, M. & St. P. Ry. Co.*, 332.

Telegraph repairer injured by stone rolling down from quarry where fellow servants negligently set it in motion. *Neal v. Northern Pac. R. Co.*, 365.

Servant's hand injured in dangerous machine after notice to his master of the danger and his promise to box it over. *Rothlenberger v. Northwestern Con. M. Co.*, 461.

PERSONAL PROPERTY TAXES. See TAXES AND ASSESSMENTS, 212.

PLACE OF TRIAL.

The provision that the costs of the Justice of the Peace must be paid before he is obligated to transfer the case to another Justice is inapplicable to a change of venue from one municipal court to another under Laws 1893, ch. 51, when the Judge is a salaried officer. *Lueck v. St. Paul & Duluth R. Co.*, 30.

PLEADING. See SHAM AND IRRELEVANT ANSWER; PRACTICE, 93.

A complaint for goods sold and delivered which does not state by whom the goods were sold is bad on demurrer. *Pioneer Fuel Co. v. Hayer*, 76.

An allegation that an act was negligently done is sufficient without stating the acts which go to make the negligence. *Royers v. Truesdale*, 126.

A general allegation of negligence is not the statement of a conclusion of law. If coupled with it is a statement of all the facts constituting the negligence, they supersede the general allegation. *Id.*

Complaint on note, answer a general denial. On affidavits and defendant's letters the answer is stricken out as sham. *Bardwell-Robinson Co. v. Brown*, 140.

PLEADING—Continued.

The question of departure by the reply from the cause of action stated in the complaint not decided, as it was not raised in the trial court. *Whitney v. National M. A. Ass'n*, 472.

The complaint upon an insurance policy to recover a loss, alleged performance on the part of the assured. The answer denied the performance. Can a waiver of performance be shown? Doubted. *Hand v. National Live Stock Ins. Co.*, 519.

An absolute denial of all liability and a refusal to pay are if plead a waiver of time in which to pay and show an immediate right of action. *Id.*

PLEDGE.

Commercial paper pledged may not be sold by the pledgee on default; but in an action to foreclose and sell the paper the court may grant that relief. *Cleghorn v. Minnesota Title Ins. & T. Co.*, 341.

POLICE POWER. See CONSTITUTIONAL LAW, 345.

POLICY OF INSURANCE.

The words "while not in use" in a policy construed. *Minneapolis T. M. Co. v. Firemen's Ins. Co.*, 35.

A policy obtained after a loss, by concealing the loss, but antedated, is voidable by reason of the fraudulent concealment. *Nippolt v. Firemen's Ins. Co.*, 275.

POOR.

Application for the support of paupers may be made to members of the board of town supervisors when they are not in session, and their refusal may render the town liable to one who thereafter, furnishes necessities to such pauper. *Tessier v. Town of Lake Pleasant*, 145.

Facts considered and held to show the pauper to have a settlement in the defendant town. *Id.*

PRACTICE. See NEW TRIAL, 25; PLACE OF TRIAL, 30; BOND ON APPEAL, 37; ELECTION CONTEST, 45; ERRORS, ASSIGNMENT OF, 100, 129; JUSTICE'S COURT, 108; INJUNCTION, 294; APPEAL TO SUPREME COURT, 325, 374; ASSIGNMENT IN TRUST FOR CREDITORS, 361; QUO WARRANTO, 411; INSOLVENCY, 415.

Held, that the case does not show that the parties to the action consented to try any issue not presented by the pleadings. *Elston v. Fieldman*, 70.

In an action to recover the reasonable value of work done, defendant's answer was a general denial; held, he could not prove a special contract. *Register Print. Co. v. Willis*, 93.

After judgment on default, defendant on excusing his default may be permitted to contest the damages although denied all other relief. *Jones v. Swain*, 251.

In replevin where the property has been delivered to the plaintiff and the defendant obtains a verdict, the judgment must be in the alternative for its return or for its value if a return cannot be had. *French v. Ginsburg*, 264.

Where in an action on a joint and several promissory note signed by four makers a several judgment was entered on default against two of them and afterwards a second judgment against a third maker and the court on motion by him to vacate the last, sanction the practice. both judgments are valid. *Wolford v. Bowen*, 267.

PRACTICE—Continued.

- Where a part of the debt is paid after suit and before judgment, yet judgment is entered for the full amount claimed, the payment may be indorsed on the execution and the irregularity disregarded. *Id.*
- An answer clearly bad in law stricken out on motion as irrelevant. *Quere?* *Dennis v. Jackson*, 286.
- Error in excluding a witness' answer to a question is cured by subsequently receiving the answer. *Young v. Otto*, 307.
- Evidence of the sayings of a deceased person was objected to as incompetent under 1878 G. S. ch. 73, § 8, and excluded and exception taken. Counsel then stated it was offered to show the mental capacity of deceased which was in issue in the case, and the matter was dropped. Held, as no new offer was made or new exception taken, no reversible error was committed. *Id.*
- Plaintiff introduced incompetent evidence of the amount of wheat shipped. Defendant afterward proved the amount to be as shown by this incompetent evidence. Held, the error was thereby cured and rendered not prejudicial. *McLennan v. Minneapolis & N. E. Co.*, 317.
- When a challenge of a juror for actual bias is by consent tried by the court, its finding is conclusive. *Hawkins v. Manston*, 323.
- A deposition taken pursuant to 1878 G. S. ch. 73, § 36, as amended by Laws 1885, ch. 53, cannot be read in evidence until it is shown that a cause existed and still exists for taking it. *Davidson v. Sherburne*, 355.
- A verdict was returned for \$1,832.31 instead of for \$1,818.54, the true amount due including interest. Held, the remedy was by motion in the trial court, not by an appeal. *Bank of Commerce v. Smith*, 374.
- Judgment may be entered against one of several parties defendant if the debt be the several debt of each, without waiting for the trial of the issues with the other defendants. *Id.*
- A single exception to the refusal of the Judge to charge the jury as asked in two or more separate requests, is unavailing if any one request be unsound. *Webb v. Fisher*, 441.
- For errors of law occurring upon the trial but not excepted to, a new trial cannot be granted. *Valerius v. Richard*, 443.
- A question not raised in the trial court will not be considered on appeal. *Whitney v. National M. A. Ass'n*, 472.
- What the jurors see or learn when sent by the court to view the premises is not evidence in the case. *Schultz v. Bower*, 493.
- The complaint alleged performance of the contract on plaintiff's part. The testimony given without objection was that performance was waived by defendant. Held the variance was waived. *Hand v. National Live Stock Ins. Co.*, 519.
- Where both parties on the trial assumed a policy to be valued, neither can on appeal raise the point that it is not. *Id.*

PRINCIPAL AND AGENT. See AGENCY.

PRINCIPAL AND SURETY. See GUARANTY, 242.

- Where one of two sureties is compelled to pay more than a half of the debt, the other must make contribution. The facts stated and held to present a case for the application of this rule. *Barge v. Van Der Horck*, 497.

PRIVITY IN ESTATE.

- A mortgagee in possession is not in privity of estate with the lessee of the mortgagor so as to make him liable on the covenants in the lease.

PRIVITY IN ESTATE—Continued.

This is so, although the mortgage be a deed absolute with a parol defeasance. *Cargill v. Thompson*, 534.

Nor is the assignee of the rents payable under such a lease in such privity, if they are assigned as security merely. *Id.*

PROBATE COURTS. See EXECUTORS AND ADMINISTRATORS, 21, 109.

PROFITS AS DAMAGES. See DAMAGES, 534.

PROSECUTRIX. See RAPE, 482.

PROXIMATE CAUSE.

If a master neglect to caution his servant against the dangers of his employment, yet if the servant is otherwise informed of, or himself observes, the danger, his master's neglect is not the proximate cause of the injury he subsequently receives. *Truntle v. North Star Woolen Mill Co.*, 52.

QUITCLAIM DEED. See DEED.

QUO WARRANTO.

Permission will not be granted to private persons to file an information for the writ to try the right of another to an office in a private corporation, unless there are exceptional circumstances which render inapplicable the remedy provided by 1878 G. S. ch. 79. *State ex rel. v. Lockerby*, 411.

RAILROADS. See PLEADING, 126; EVIDENCE, 142; NEGLIGENCE, 237, 271; ROADS AND STREETS, 422.

The owner of a cow allowed her to run at large, knowing the railroad in the vicinity to be unfenced; held, this did not necessarily prevent his recovery of damages from the railroad company for negligently killing the cow on its track. *Ericson v. Duluth and Iron Range R. Co.*, 26.

The seller of a ticket for passage issued by a common carrier does not from the sale alone undertake for anything beyond the genuineness of the ticket. *Elston v. Fieldman*, 70.

It cannot be presumed that a section boss has authority to admit the value of stock negligently killed on the track. *Holverson v. Chicago, M. & St. P. R. Co.*, 142.

Neither the charter of the St. Paul, M. & M. Ry. Co. nor that of the Minneapolis & St. L. Ry. Co. imposes on them the duty of paying to abutting owners damages caused by change of the grade of a city street at a crossing of the railway tracks. *Kelly v. Minneapolis City*, 294.

Laws 1893, ch. 66, to regulate the sale of passenger tickets is a valid statute. *State v. Corbett*, 345.

Employee repairing telegraph line and laborers blasting out rock to repair the track are fellow servants and the railroad company is not liable for the injury to one by the negligence of the others. *Neal v. Northern Pac. R. Co.*, 365.

Laws 1863, ch. 60, requiring all passenger trains to stop at county seats, although they carry the mail, is a valid statute. *State v. Gladson*, 385.

RAPE.

The uncorroborated testimony of the prosecutrix being improbable and impeached in some particulars by her own previous inconsistent statements, held not sufficient to justify conviction for rape. *State v. Connelly*, 482.

REAL ESTATE BROKER. See BROKER.

RECEIVER. See INSOLVENCY, 415.

A collusive sale of the insolvent's property made by the receiver to the insolvent's wife, or to a third party for the insolvent's benefit, is fraudulent and void as to the creditors, and the receiver is chargeable in his account with the full value of the property so sold. *In re Shea*, 415.

REDEMPTION FROM SALE.

The grantee of the mortgagor has but twelve months from the day of sale in which to redeem real estate sold on foreclosure of mortgage. No proceedings to foreclose subsequent liens of mechanics or others will enlarge the time. *Gates v. Ege*, 465.

REFORMATION OF WRITTEN CONTRACT.

Although the terms of the instrument are in the very language intended by the parties, it may be reformed if they were mistaken as to the property to which such terms applied. *Crookston Imp. Co. v. Marshall*, 333.

If there be in such case mistake on one side and fraud on the other, the instrument may be reformed. *Id.*

The evidence must be clear, convincing and satisfactory to entitle plaintiff to reformation of the instrument. *Id.*

RENT. See LANDLORD AND TENANT, 6, 278, 381.

A lease void under the statute of frauds will nevertheless regulate the terms as to the rent if the tenant goes into possession and occupies the premises. *Steele v. Anheuser-Busch Brewing Ass'n*, 18.

REMOVAL FROM OFFICE. See OFFICER, 1; COUNTY TREASURER, 261.

REPLEVIN.

Where the property has been delivered by the plaintiff and the defendant obtains a verdict he is not entitled to elect to take judgment for the value only, but must take it in the alternative for a return of the property or for its value in case a return cannot be had. *French v. Ginsburg*, 264.

RESCISSION OF CONTRACTS.

Oxford ordered a steam threshing outfit, stating terms of warranty. He signed the order at dusk at request of a clerk without reading it, and on the clerk's statement that it was nothing but an order for the machine; held, fraud not shown entitling him to rescind. *Oxford v. Nichols & Shepherd Co.*, 206.

If an accord and satisfaction be rescinded by the parties, the original claim is revived so that suit can be brought thereon as if the accord had never been made. *Heerenrich v. Steele*, 221.

RES JUDICATA.

A domestic judgment on the merits is conclusive in a subsequent action between the same parties upon all the issues passed upon in the first action. *Johnson v. Johnson*, 100.

Mitchell agreed to convey land by quitclaim deed in fee simple to Chisholm, and took his notes for the price. In a suit on one of the notes judgment was entered that Mitchell take nothing, that he had no title and that the note was without consideration. Mitchell then brought ejectment for the land; held, the former judgment was conclusive between the parties, that the contract was rescinded and Mitchell entitled to possession. *Mitchell v. Chisholm*, 148.

RIPARIAN RIGHTS.

The description of land in deed read, "and thence east to the shore of Lake St. Croix, thence northerly along the lake shore to Chestnut Street, thence west, &c." Held, to convey all riparian rights of the grantor. *Castle v. Elder*, 289.

ROADS AND STREETS.

In the control and improvement of its streets a municipal corporation has the same rights and powers as a private owner has over his own land and as to abutting owners is subject to the same liabilities. *Munger v. City of St. Paul*, 9.

Alteration of established grade, evidence as to. *Id.*

A municipal corporation is liable for an injury caused by an unsafe condition of a sidewalk, although the defect exists in the plan of the walk, if there be no necessity for the defect. *Blyhl v. Village of Waterville*, 115.

An alley twenty feet wide running through a block in St. Paul from street to street was obstructed at one end by a railroad roundhouse. Held, owners of lots abutting on the alley sustained special damage from the obstruction not common to the general public. *Kaje v. Chicago, St. P., M. & O. Ry. Co.*, 422.

ST. PAUL CITY CHARTER. See OFFICER, 1; ROADS AND STREETS, 9.

SALES. See BROKER, 70; RESCISSION OF CONTRACTS, 206; ESTOPPEL, 499.

A contract to sell and deliver logs to defendant on or before April 10, 1891, upon the railroad right of way near Carlton, convenient for loading onto cars, is performed by so delivering them and the title passes to the purchaser as soon as delivered. If they are thereafter burned the loss is his. *Fredette v. Thomas*, 190.

Defendants ordered thirty-three dozen neckties of ten different styles. Plaintiffs shipped the goods but when received, defendants accepted part and rejected and returned others as not equal to sample. Held, they had the right to do so. The contract was severable. *Potsdamer v. Kruse*, 193.

Defendant said to plaintiff, "You let Kiely have seed wheat and I will see you paid." He did so, but took Kiely's note for the price, bearing ten per cent interest. Held that defendant is liable for the wheat with seven per cent interest. *Amort v. Christofferson*, 234.

A sale with privilege to purchaser to return the property in a certain contingency, becomes absolute if the purchaser disables himself from returning it, as by selling or mortgaging it. *In re Ward's Estate*, 377.

SEAL.

The word seal affixed to an instrument is a sufficient device by way of seal to entitle the instrument to record. *Cochran v. Stewart*, 499.

SEED-GRAIN NOTE.

A lien on a crop by virtue of a note for the seed under 1878 G. S. ch. 39, §§ 21, 22, has priority over a lien upon the same crop under a previously executed chattel mortgage. *McMahan v. Lundin*, 84.

SETOFF. See COUNTERCLAIM, 72.

Insolvency is an equitable ground for setoff of a demand not due against a demand in the hands of an assignee in trust for creditors. *St. Paul & M. Trust Co. v. Leck*, 87.

SHAM AND IRRELEVANT ANSWER.

The complaint was on a promissory note, the answer a general denial. On affidavits and defendant's letters the court on motion struck out the answer as sham as to two of the defendants. *Bardwell-Robinson Co. v. Brown*, 140.

A motion to open a default and allow defendant to answer denied in part, because the answer proposed was in part sham and evasive. *Jones v. Swain*, 251.

An answer clearly bad in law stricken out as irrelevant. Quere? *Dennis v. Jackson*, 286.

SHERIFF'S FEES.

A sheriff cannot charge constructive mileage on uncollected tax warrants to collect delinquent personal taxes. He can only charge for the distance actually and necessarily travelled. *Grundysen v. Polk Co.*, 212.

When a sheriff sells property on execution to the execution creditor, it is a collection of the amount bid and he is entitled to percentage thereon. *Sharvey v. Central Vermillion Iron Co.*, 216.

SIDEWALK. See **ROADS AND STREETS.****STATE BANKS.** See **BANKS AND BANKING**, 248.**STATUTE OF LIMITATIONS.** See **LIMITATION OF ACTIONS.****STATUTES, CONSTRUCTION OF.** See **BILLS AND NOTES**, 391.

Sp. Laws 1889, ch. 64, § 6, does not authorize the committee having charge of the combined court house and city hall in St. Paul to appoint a custodian of the building for a period extending beyond the year for which they are themselves appointed. *Egan v. City of St. Paul*, 1.

A part of a statute or ordinance may stand though another part be void, if the void part be not essential to the valid. *Village of Wykoff v. Healey*, 14.

STOCK RUNNING AT LARGE. See **ESTRAYS**, 26.**STOCK AND STOCKHOLDERS.**

A judgment against a corporation and others jointly for the recovery of money is a debt of the corporation for the purpose of enforcing against its stockholders their liability for unpaid subscriptions and their statutory liability. *Frost v. St. Paul B. & Invest. Co.*, 325.

Defendant subscribed for shares of stock in a corporation to be delivered when paid for. Held, an action to recover the unpaid balance of the subscription could not be maintained without first tendering the stock. *Walter A. Wood Harvester Co. v. Jefferson*, 456.

The statutory liability of stockholders for corporate debts cannot be enforced in insolvency proceedings against the corporation under Laws 1881, ch. 148. *Olson v. Cook*, 552.

Creditors may bring suit under 1878 G. S. ch. 76, to enforce the statutory liability of stockholders although insolvency proceedings are pending. *Id.*

The liability of the stockholder includes debts of the corporation contracted before he acquired his stock. *Id.*

SUBSCRIPTION FOR STOCK. See **STOCK AND STOCKHOLDERS**, 456.**SUPREME COURT.** See **APPEAL TO SUPREME COURT**, 325, 374.**SURETY.** See **PRINCIPAL AND SURETY**, 497; **GUARANTY**, 242.

TAXES AND ASSESSMENTS. See **TAX SALES**, 203; **TAX TITLES TO LANDS**, 397; **COUNTY COMMISSIONERS**, 434.

The board of county commissioners cannot cancel personal taxes until the clerk of the District Court delivers to it the sheriff's list of those uncollected and his affidavit under Laws 1885, ch. 2, § 6, that they are uncollectible. *Grundysen v. Polk Co.*, 212.

Proceedings to assess a special tax for benefits conferred by a public improvement cannot be enjoined by the property holder on the ground of irregularities therein. The right to defend in those proceedings and to appeal, give such owners an adequate remedy. *Kelly v. Minneapolis City*, 294.

TAX SALES.

Under Laws 1881, ch. 135, the state acquired no title to the land by virtue of the tax judgment unless the land was offered for sale and bid in for the state in default of other bidders. *Pine Co. v. Lambert*, 203.

TAX TITLES TO LANDS. See **TAX SALES**, 203.

The County Auditor's notice under 1878 G. S. ch. 11, § 121, must be directed to the person in whose name the land is assessed at the date the notice is issued, and if not so directed it is void. *Eide v. Clarke*, 397.

The County Auditor's notice under 1878 G. S. ch. 11, § 121, stated the tax judgment was entered September 19, 1883, and that the sale thereunder was made August 14, 1883. In fact the judgment was entered on the last date and the sale was made on the first. Held the notice was void. *Id.*

TENANT. See **LANDLORD AND TENANT**.

TENDER.

Where objection to the sufficiency of a tender is made solely on a ground then specified, the party is precluded from afterwards objecting on another ground, at least where it is trifling in its nature and such that if made at the time the other party could have easily remedied it. *Lathrop v. O'Brien*, 175.

TOWN SUPERVISORS.

Application for the support of paupers may be made to members of the board when they are not in session, and their refusal to give aid may render the town liable to one who thereafter furnishes necessities for such pauper. *Tessier v. Town of Lake Pleasant*, 145.

TREASURER. See **COUNTY TREASURER**, 261.

TRESPASS.

The right to lateral support of land from adjacent soil is an absolute right of property. To remove such adjacent soil is a violation of the right of property. *Schultz v. Bower*, 493.

TRIAL. See **PLACE OF TRIAL**, 30; **PRACTICE**, 323; **JUROR**, 425; **CHARGE TO JURY**, 441.

TROVER. See **ACTION**, 64.

TRUSTEE. See **COUNTERCLAIM**, 72.

UNITED STATES SURVEYS OF PUBLIC LAND. See **EVIDENCE**, 135.

USAGE. See **CUSTOM AND USAGE**.

VENDOR AND VENDEE. See EVIDENCE, 96; FIXTURES, 104; RES JUDICATA, 148; SALES, 190, 193; RESCISSION OF CONTRACT, 206.

If the vendee enter into possession of land under the contract with his vendor he is estopped while he remains in possession from disputing the vendor's title. *Mitchell v. Chisholm*, 148.

A person other than the vendee named in an executory contract for the sale of real estate cannot, by a parol acceptance of it as his own, make it a binding contract between himself and the vendor. *Harris v. McKinley*, 198.

A sale of property with privilege to the purchaser to return it in a certain event becomes absolute if the purchaser disable himself from returning it, as by selling or mortgaging it. *In re Ward's Estate*, 377.

Defendant subscribed for shares of stock in a corporation to be delivered when paid for. Held, the stock must be tendered with demand for the unpaid balance of the subscription. *Walter A. Wood Harcester Co. v. Jefferson*, 456.

Where a thing is sold for cash, but a check is accepted, and the property and an absolute bill of sale of it are delivered, and the check afterwards turns out to be worthless, but meantime the vendee has sold and delivered the property to a subvendee who bought in good faith for value, in reliance on the vendee's muniments of title, such subvendee has as against the seller the title and a superior equity. *Cochran v. Stewart*, 499.

VENUE. See PLACE OF TRIAL, 30.

VERDICT.

Sustained by the evidence. *Nelson v. St. Paul Plow Works*, 43; *Quelprud v. Kothe*, 114; *Tessier v. Town of Lake Pleasant*, 145; *Haugen v. Younggren*, 170; *Kennedy v. Chicago, M. & St. P. Ry. Co.*, 227; *Hill v. Duluth City*, 231; *Amort v. Christofferson*, 234; *McKillop v. Duluth Street Ry. Co.*, 408.

Not sustained. *Truntle v. North Star Woolen Mill Co.*, 52; *Oxford v. Nichols & Shepherd Co.*, 206; *Hawkins v. Manston*, 323.

A verdict was returned for \$1,832.31 instead of for \$1,818.54, the true amount due on the note in suit including interest. Judgment was entered on it. Held, the remedy was to move in the trial court for its correction. *Bank of Commerce v. Smith*, 374.

VIEW OF LOCUS IN QUO BY THE JURY.

What the jurors see or learn when sent by the court in a body to view the premises is not evidence in the case. *Schultz v. Bower*, 493.

VILLAGE INCORPORATION.

In Laws 1885, ch. 145, § 3, for the incorporation of villages the words "lands adjacent thereto" include only those which lie so near the center of population as to be suburban in character and to have community of interest with the platted portion. Large tracts of rural territory cannot be included. *State ex rel. v. Minnetonka Village*, 526.

WATER AND LIGHT BONDS. See DULUTH CITY CHARTER, 256.

WIFE. See HUSBAND AND WIFE, 225.

WILLS.

The test of mental capacity to make a deed or transfer of personal property is the same as that applicable in the case of wills. *Young v. Otto*, 307.

WITNESS. See EVIDENCE, 81, 482; COSTS AND DISBURSEMENTS, 167; DEPOSITIONS IN EVIDENCE, 355.

Husband or wife is a competent witness against one accused of adultery with the other. *State v. Volland*, 225.

Prior contradictory statements do not necessarily discredit a witness. The effect of the evidence is for the jury. *In re Hess' Estate*, 282.

The plaintiff on cross examination stated a part of a conversation of the testator. On redirect examination she was entitled to state the whole of this conversation and thereby prove a contract with deceased to pay her wages. *Id.*

A farmer is presumed to know the market value of crops such as he raises and sells. *McLennan v. Minneapolis & N. E. Co.*, 317.

The credibility of a witness, his contradictory statements and interest in the result are for the jury. If there is sufficient evidence to sustain the verdict it must stand. *McKillop v. Duluth St. Ry. Co.*, 408.

WORDS AND PHRASES.

"Before trial commenced" in 1878 G. S. ch. 65, § 20, defined. *Lueck v. St. Paul & Duluth R. Co.*, 30.

"While not in use" in an insurance policy construed. *Minneapolis T. M. Co. v. Firemen's Ins. Co.*, 35.

"Negligently" in pleading held sufficient without the facts constituting the negligence. *Rogers v. Truesdale*, 126.

"Adverse party" defined. *Frost v. St. Paul B. & Invest. Co.*, 325.

"Owner" held to include those who have the control and use. *State v. Corbett*, 345.

The words, "lands adjacent thereto," in Laws 1885, ch. 145, for the incorporation of villages do not allow the inclusion of large tracts of rural territory. *State ex rel. v. Minnetonka Village*, 526.

WRITING TO REFRESH RECOLLECTION OF WITNESS.

A writing which a witness may inspect to refresh his recollection must be one which enables him after its inspection to testify to the facts from his own recollection of them. *Douglas v. Leighton*, 81.

Q. L. B.

WEST PUBLISHING CO., PRINTERS AND STEREOTYPERS, ST. PAUL, MINN.

5316-55



